AN ENQUIRY INTO THE JURISDICTION OF THE CHANCERY IN Cauſes of Equity.

I. *Upon what Ground and Foundation that Juriſdiction is Built.*
II. *At what time the Chancery began to Exerciſe that Juriſdiction, and upon what Occaſion.*
III. *How Modeſt and Moderate the Exerciſe of it was at firſt.*
IV. *How wonderfully it is Grown, and Enlarged; And*
V. *What is the beſt Remedy for Reſtoring, and Maintaining the Common Law.*

Humbly ſubmitted to the Conſideration of the Houſe of Lords, to whom it belongeth to keep the Inferiour Courts within their Bounds.

By Sir *ROBERT ATKYNS*, Knight of the Honourable Order of the BATH.

To which is added,

The *CASE* of the ſaid Sir *Robert Atkyns* upon his Appeal, againſt a Decree obtained by Mrs. *Elizabeth Took* and others, Plaintiffs in Chancery, about a ſeparate Maintenance of 200 *l. per Annum, &c.*

London: Printed in the Year 1695.

TO THE
RIGHT HONOURABLE
THE
LORDS Spiritual and Temporal
IN
Parliament Assembled.

My Lords,

THE following Treatise, together with the state of the Case annex'd to it, is Humbly Presented to your Lordships, to whom it properly belongs; the Subject matter of both, relating to that Supream Jurisdiction in Cases of Appeals from Courts of Equity which is exercis'd by your Lordships, as being the last Resort: Your Lordships being also the true and just Moderators in all Disputes between other Courts in points of Jurisdiction; you having the Coercive and Directive Power of keeping the rest of the Courts within their due Bounds, set them by the Law and Constitution of the Nation, that they do not Overflow their Banks, nor Usurp nor Encroach one upon another.

Your Lordships besides, have a more peculiar Right and Title to the Service of the Composer of this Treatise, who hath had the Honour to serve your Lordships for some Years, and in several Parliaments, in an Eminent Station, and with a large Testimony and favourable Acceptance from your Lordships, as appears by that hearty and kind Address which your Lordships made on his behalf; besides his ordinary Attendance and Assistance as one of the Judges, which he began about Four and twenty years since.

If

The Epiſtle Dedicatory.

If what he hath written ſeem too free and plain, he hopes he is excuſeable, the Neceſſity and Importance of the Caſe ſo requires: And he may be allowed a more than common Zeal for the **Common Law**, *he having ſat ſo many Years as a Judge in ſeveral of the Courts in* **Weſtminſter-Hall**; *he himſelf, and his Three immediate Anceſtors, having been of the Profeſſion for near Two hundred Years, and in Judicial places; and (through the Bleſſing of Almighty God) have Proſpered by it. His Great Grandfather living in the time of King* **Henry VII.** *and they all have, in their ſeveral turns, undergone the Charge and Labour of Readers of* **Lincolns-Inn.**

And your Lordſhips, and your Noble Anceſtors have always, and upon many great Occaſions, conſtantly Teſtified a true and hearty Zeal for the **Common Law** *of* **England**; *as will largely be manifeſted by this Treatiſe, and the Concluſion of the ſtated Caſe annexed to it.*

The only Deſign of this Treatiſe, being meerly to Aſſiſt and Serve your Lordſhips, in your Diſcharge of that Mighty Truſt repoſed in your Lordſhips; to whom the Treatiſe and Caſe is entirely ſubmitted, by

My Lords,

Your Lordſhip's moſt Humble,

And Faithful Servant,

Robert Atkyns.

AN ENQUIRY INTO THE Jurisdiction of the *CHANCERY*, IN Cauſes of Equity, &c.

IT cannot, nor (as to the preſent Occaſion and Enquiry) it need not be denied, but that the Names of Chancellor and Chancery are very Ancient, not only in Foreign Countries, but even in this Nation, both in the times of the *Saxons*, and continued from thence down to our times. But our proper buſineſs at preſent is to Enquire, what thoſe Great and High Names did at firſt import and ſignifie; and what Change hath been introduced in their ſignification by proceſs of time, derived down to this preſent Age. *The Names of Chancellor, and Chancery.*

Sir *Henry Spelman*, (that Learned Antiquary,) in his Gloſſary printed in the year 1687. *pag.* 109. gives us a Series of the Chancellors in this Nation, and begins with *Turketulus*, Chancellor to *Edward* the Elder, (as he is called in our Hiſtory of the *Saxon* times) in the year of our Lord 924. near 800 years ſince. *Rembaldus* was Chancellor to *Edward* the Confeſſor, *Roll. Abr. Tit. Chancellor.* 1 *part.* 384. *The firſt Chancellor in* England.

Sir *Francis Bacon*, (ſometime Lord Chancellor of *England*) in his *Reſuſcitatio*, at the end of that Book, ſets down a Catalogue of our Chancellors, beginning with *Mauritius*, in the time of our *William* the Firſt, *Anno* 1067. And *Dugdale* in his *Origines Juridiciales* gives the ſame. See Sir *Edw. Cooke* 4 *Inſtit.* 78. in the Chapter of the Chancery, are the Names of ſeveral Chancellors n ancient times.

This ſhews the Antiquity of the Names; but our buſineſs is to learn the Nature of them, and what their Buſineſs and Employment was at firſt, and when, and how it changed. *The Nature of the Chancery, and Office of Chancellor.*

Nomen ab Officio. We may learn what the latter (the *Officium*) is, from the Name; ſo that the *Nomen* may be a true *Notamen* of the thing, (as it ought to be.)

The Name of an Office, or Employment, generally imports the moſt eminent and noted part of the Employment, though it conſiſts of divers parts. *Cowel* in his Interpreter upon the word (Chancellor) deduces it from *(Cancellare) id eſt, Literas, vel ſcriptum, lineâ per medium deductâ, damnare.* Which, (as the word now in uſe with us) is to Cancel, or make void; and it is performed by drawing croſs Lines over the Letters Patents, or other Writings, to ſignifie they are made void, and are to be of no farther uſe.

So Minſhew *upon the word.*

And this ('tis likely) was borrowed from the Lettices of Wood or Iron laid Croſwiſe one over another, to divide or encloſe one part of a Room, from the reſt of that Room, ſo that a Man might ſee through them; within which Incloſure the Judge, or Officer ſate, ſo as to be ſeen and ſpoken with, but yet defended from the preſs of thoſe that reſorted to them. As it is uſed in Churches, where the Chancel is divided from the Body of the Church, and the Clergy from the People, in the firſt deſign of that partition. And this rather relates to the place called the Chancery, than to the Chancellor. But from the reſemblance of this partition, the word is alſo applied to the Office or Duty of the Chancellor, which was *(Cancellare)* to draw croſs Lines over a Writing, that is, to Cancel it.

Camb-den's Britannia, p. 143.

From hence it may be collected, that at firſt the Chancellors principal Imployment was, to Cancel Writings, for he had his Name from it.

And *Cowel* cites *Lupanus*, as teſtifying the ſame. That the Name of *Cancellarius* was belonging to every Regiſter, who alſo was ſtyled *Grapharius* a Scribe, a writer of Writs, or Actuary, a Regiſter of the Acts and Proceeding of a Court; not a Judge, but an Officer, attending upon Judges; *Qui conſcribendis Judicum actis dat operam.*

A Miniſterial, not Judicial Office at firſt.

It appears by Sir *Francis Bacon's Reſuſcitatio* (before cited) That *Turketul* (before mentioned for a Chancellor) was Abbot of *Croyland*, (as the ſucceeding Chancellors till the time of King *Henry* the 8*th.* were generally Clergymen,) and their principal Employment was in ſerving at the Altar in Spiritual Things.

And in a Subſcription by *Rembaldus*, Chancellor to *William* the Firſt, as a witneſs to Royal Charters, (among others) he did not ſubſcribe in the firſt place, but after divers Biſhops, Abbots, and others; which ſhews ſomething of his Degree and Character at that time. And *Mauritius* (Chancellor to *William* the Conqueror) ſubſcribed as a witneſs to that King's Charter after the Biſhops, and before the Abbots. *Rolle's Abridgment par.* 1. *fol.* 384. and long before the Conqueſt, in the time of *Ethelbert*, (the firſt Chriſtian King of the *Saxons*) *Augemandus* the Chancellor

cellor (as Sir *Francis Bacon* ſuppoſes) ſubſcribes a Charter by the Title of (*Referendarius*) a Referee, or Reporter, (as *Minſhew* upon that word) which ſeems by that to be the higher Title; and the Office of both, as he obſerves, ſignifies an Officer that received Petitions directed to the King, as Maſters of Requeſts have done of late; and made out Writs and Mandates, ſuited to the different Caſes of the Petitioners: Whence 'tis probable, the place of the Office afterwards acquired the Name of *Officina Brevium.*

It appears by Sir *Henry Spelman*'s Gloſs. *pag.* 106. *Connectuntur Munus Cancellarii & Capellani Regis* in the time of King *Ethelbert*, *nec deinceps*, *niſi rarò*, *disjunguntur*: The Chancellor was uſually the King's Chaplain.

In the Conqueror's time the Chancellor was ſtyled the Maſter of the Colledge of Scribes, or Clerks, which Colledge probably was, what we now call the *Chancery Office*; whoſe Duty was *Diplomata Scribere*: whence, what was daily written by them have been called (*Writs*).

Sir *Henry Spelman*, *ib. pag.* 106. under the Title or Head, *De Cancellario recentiori, & de Cancellariâ*, ſays, *Olim nec prætoriâ fungebatur Juriſdictione, nec Curiæ alicujus prærogativâ*; which ſeems to deny him any Juriſdiction; and makes the *Chancery*, rather an Office than a Court, even in the Latin Proceedings of it. *The Chancery, an Office.*

And mentioning *Gervaſius Tilburienſis*, (ſuppoſed to be the Author of the Black Book in the *Exchequer*) in *Henry* II. time, and *Bracton*, who was a Judge in *Henry* III. time, treating of the *Chancery*; *Non de Curiâ* (ſays Sir *Henry Spelman*) *intelligendi ſunt, ſed de Officinâ Brevium & Chartarum Regiarum.*

8 *H.* 4. 13. *b.* by *Gaſcoign* chief Juſtice, it is ſaid, The *Chancery* is not a Judicial Court. See the true Nature and Duty of the Office of the Lord Chancellor, ſet out by our ancient Author *Fleta*, *lib.* 2. *cap.* 12. to direct Suitors to Writs proper for their reſpective Caſes.

Sir *Edward Coke*, 2 *Inſtit.* 552. and 554. ſays, The Court of *Chancery*, and the *King's Bench*, are but one place; that is, The *Chancery* was an Office in, or belonging to the *King's Bench.* And the Author of *Novarum Narrationum*, written in the beginning of *Edward* III. (4*th Inſtit.* 81.) calls it a Court, yet he corrects and qualifies it again, and ſays, the uſe of it was, *Pro Brevibus Originalibus emanandis, ſed non pro placitis Communibus tenendis.* It had no Judicature. And Sir *Henry Spelman* further obſerves, That *Briton*, (ſuppoſed to be the then Biſhop of *Hereford*) who wrote in the time of *Edward* I. giving an exact account of all the Civil Courts in his time, *De hac tamen*,

(meaning

(meaning the *Chancery*) *ne verbum ille, nec, quod ſciam, alius quiſquam, ante ævum Edvardi Tertii, vel eum circitèr.* Then it began (it ſeems) with a Juriſdiction at Common Law; whereby we may conjecture, that about the time of King *Edward* III. or *Richard* II. time rather, that Office ſet up for a Court, as what here follows ſeems to concur with; and then began their Latin, and Common Law Pleas, as diſtinct and ſeparate from the Court of the *King's Bench*; And upon the Judgments given in their Common Law and Latine Proceedings, (which Sir *Henry Spelman* conceives not to be very ancient neither) *Fitz. Abr. Error.* 70. *Dier.* 315. *plac.* 100. Error lies in the *King's Bench*; which proves the *King's Bench* to be the Superiour Court, whereof formerly it was but a part and member. Nor can the Chancery, to this day, try the Iſſues there joyn'd, in matters of fact, but by the help of the *King's Bench*; ſure therefore it was very weak and deficient, if it were a Court, not to have power to try its own Iſſues. Nor are thoſe (*a*) Iſſues tryed before the Chancellor; he is not ſo much as preſent at the Tryal of them, having no Authority in it, but they are tryed before the Judges of the *King's Bench*; *Dyer* 288. *plac.* 51. & *Latch.* 3. 5. *Rep.* 92. 9. *Rep.* 98. and then returned again to the Office whence they came, *Rolles* 2d *Rep.* 291. *Stury* and *Stury's* Caſe 21. *Jac.* ſays, they are but one Court. *Rolls* 2d *Rep.* 349. by Judge *Doderidge* towards the end, *viz.* That as to the Law-Proceedings, the *King's Bench* and *Chancery* are but one Court. *Mich.* 10. *E.* 3 *fo.* 59. (by *Shard*) that the *King's Bench*, and the *Chancery*, are but one place. And does that look like a diſtinct Court, where Iſſues are join'd? but the ſame Court (if it be a Court) cannot try thoſe Iſſues; How defective is that Court then in its Power? Where ſhall we find the like in the World? It plainly proves, that this High Court of *Chancery*, in its Original, was but an Office belonging to the higher Court of the *King's Bench*.

When the Chancery, from an Office, ſet up for a Court.

(*a*) 5. *E.* 3. *c.* 14.

In its Equity-Proceedings 'tis not a Court of Record; this is acknowledged of all hands; but *ab incertis initiis excrevit ad Inſignem Magnitudinem* ſays (that Learned Antiquary) Sir *H. Sp.* He makes a conjecture of the Original of it's Juriſdiction in Equity; wherein by the way he aſcribes to the King a greater truſt and power than our Common Law doth own, as ſhall be further noted hereafter; for *Rex id poteſt, quod jure poteſt, viz.* Sir *H. Sp.* gives the King a power of deciding Cauſes in his own perſon, and of mitigating the rigour of the Law by himſelf alone; Unleſs in this laſt, he be underſtood only in his Prerogative of Pardoning, which belongeth to the King. But he moderates what he had ſaid before, of the Latitude of the Prince's power; *in Juſtitiâ*

The Chancery, as to its Equity, no Court of Record.

Juſtitiâ exhibendâ, by ſubjoyning, that the Prince ſtill did it by the Adminiſtration of his Court of Peers and Barons; which, according to the Dialect now in uſe, muſt refer to the Lords Houſe, or Houſe of Peers. And by his Margent he underſtands the Reſidence of the Court of Peers, which he ſpeaks of to be (*Aula Regis*,) ſometimes ſo called in the *Saxon Laws*; and here indeed was the true and ancient Right of the Juriſdiction in Equity; and (*Curia ſua*) conſiſted of the Peers. *Barones olim de cauſis cognoſcebant ad aulam Regiam delatis. Ib.* Sir *Hen Spelman*'s *Gloſ. pag.* 68. *Inter privilegia Baronum*, on the word (*Baro.*) But that I may make haſt (as this great Officer the Chancellor himſelf did, in proceſs of time from his minority, and the firſt dawning of his power, to bring him to his Magnitude;) I proceed to enquire about what time, by what ſteps and degrees, by what Means, and upon what Occaſion, he arrived to his Altitude and tranſcendent power, as our Authors inſtruct us.

The King with the Peers adminiſtred Juſtice, not the K. alone.

But before I enter upon it, let me premiſe ſome few things, which may guide us in paſſing a Judgment upon what is ſo ſet down, and I ſet down nothing as my own private opinion; I only make a Collection of what is delivered upon this Subject, by the moſt grave and learned Antiquaries and Authors; and I ſubmit all to the Judgment of the Lords, for whoſe Information only this is written.

It hath been the Wiſdom, and I may ſay the true natural Genius of this Nation, from its Original and Infancy, eſpecially in Adminiſtration of Juſtice, and of what is ſubſervient and conducing towards it, to place the Power and confer the Truſt, not in any one ſingle Perſon, but in many or more than one. And it is the Advice of a Lord Chancellor, Sir *Francis Bacon*, as to the very Juriſdiction we are Treating of, which he calls *Prætorian*; let it not (ſays he) be aſſigned over to one Man, but conſiſt of many, becauſe it little differs from the power of making Law; and he would have their power limited to caſes heinous and extraordinary, and not invade ordinary Juriſdictions; and that it reſide in the Higheſt Courts of Judicature, (which with us is the Houſe of Lords) leaſt it prove a matter of Supplantation of Laws: See his *Advancement of Learning*, *pag.* 445. and *pag.* 446. the 43*d Aphoriſm.* Above all, ſays he, it moſt imports the certainty of Laws, that Courts of Equity do not ſo ſwell and overflow their Banks, as, under pretence of mitigating the rigour of the Laws, to diſſect or relax the Strength or Sinews thereof, by drawing all to Arbitrement. The Lord *Coke* in his firſt *Inſtit.* 155. *a* and *Plowd.* in his Commentaries, take notice, that the wiſdom of the Law had ſo ordered it, That matters of fact ſhall be decided by Twelve Men in a Jury; and matters in Law, by

The Adminiſtration of Juſtice not entruſted in one ſingle hand by the Common Law.

Twelve Judges Sworn to the Common Law; in no Case by one single Person.

Sir *Henry Spelman* affirms, that this was the Genius or Humour of all *Europe*. But, to confine our selves to our own Nation, he particularly observes, that *Prisci nostri Reges coram Omni Regno jurabant*, &c. *Justitiam per Concilium Procerum regni sui tenturos*. The Kings alone never did determine matters either in Law or Equity. *Ingens Exemplorum Multitudo, quibus prisci illi Reges Causas ad palatium suum allatas, non Unius alicujus judicio, sed Communi Procerum Concilio definiêre*. This circumscribes that unlimited Power, which in the beginning of that Paragraph Sir *Henry Spelman* seems to ascribe singly and solely to the Kings; from whence the Advocates of the mighty Power of the *Chancery*, (like true *Herodians*, who cried up *Herod*) would derive the like to their Chancellors. *Fessi autem* (meaning it of our Kings) *tantæ rei mole, coguntur exemplo Moysis, Judiciorum lancem Delegatis credere*. No doubt but it was done by the *Commune Concilium* of the Nation, as Mr. *Selden* in his Titles of Honour concludes of many such like publick Transactions; tho the Records and Rolls of them are not now extant. *Tunc erectis seorsim à Palatio Tribunalibus*, (pointing, as he supposes, at the Original of our Courts of *Westminster*-Hall) *Singula multis quamvis ex Canone judicaturis* (tho tied to certain Rules) *Nullum unico Substituerunt Judici, Justitiam, (uti veritatem) rati tutius, apud plures conservari. Neque ideo, vel in Curiis ipsis infimis & Rusticanis* (this best shews the Nations Humour) *Monocriten preferebant qualemcunque*; it would not be endur'd. The Freeholders in the Country Courts, meant by the *Curiæ rusticanæ*, were to determine Fact and Law both: that is, were the sole Judges of the *Folkmotes*, or Country Courts: Only there lay an Appeal in exorbitant Cases, that is, in extraordinary matters, *ad Palatium Regni*, and they received a Determination from the King, (not from him alone) but *E Concilio Procerum*.

This expounds the Law of King *Edgar*. *Lambert de priscis Anglorum Legibus*, pag. 63. *Viz. Nemo in lite Regem appellato, nisi quidem domi* (*viz.* the Country Court) *consequi non poterit. Sin Summo jure domi urgeatur, ad Regem, ut Is onus aliquâ ex parte allevet, provocato*: that is, Moderate the rigour of the Judgment, not alone, nor by a Chancellor, but by advice of the Peers, as before is manifestly proved.

Judges joined with the Chancellor.

Sir *Henry Spelman* proceeds further to observe, that several subsequent Statutes which gave power in many particular and limited matters to the Chancellor, never referred them to him alone, but still in Conjunction with others. 31. *H.* 6. *C.* 4. the Chancellor has power given him, calling to him any of the Justices

ſtices to proceed by their Advice, even in the Court of *Chancery* it ſelf. 5^to^ *E.* 4. *Inter Cobb & Nore*, by Authority of Parliament, Power is given to the Chancellor and Two Judges, to order a matter of Colluſion. In all this the Humour and true Genius of the Nation was ſtill purſued. He inſtances too in the Statutes made in the 20th year of *Edward* III. about the Foreſt of *Windſor*, and in the Statute about Aſſizes of *Novel Diſſeiſin*, whereby in ſpecial Caſes *pro tempore* only, Power was given to the Chancellor, in Conjunction with others.

In the Caſe of Prohibitions, in Sir *Edward Coke*'s 12 *Rep.* 63. * *Bancroft*, Archbiſhop of *Canterbury*, had informed King *James* the Firſt, That the King himſelf might decide Cauſes, *&c.* in his Royal Perſon; and that the Judges are but Delegates of the King; and that the King may take what Cauſes he pleaſe to determine, from the determination of the Judges, and may determine them himſelf. And the Archbiſhop ſaid, that this was clear in Divinity, that ſuch Authority belongs to the King by the Word of God. But Sir *Edward Coke* (then Chief Juſtice) in the Preſence, and with the clear Conſent of all the Judges of *England*, and Barons of the *Exchequer*, anſwered, That the King in his own Perſon cannot adjudge any Caſe, either Criminal, or between Party and Party; but it ought to be determin'd in ſome Court of Juſtice, according to the Law and Cuſtom of *England*. 4 *Inſtit.* in the Chap. of the King's Bench, *fol.* 70. The King (that is, the Law and Conſtitution of the Government) hath committed all Power of Judicature to ſeveral Courts of Juſtice. This is neceſſary to be remembred, becauſe it is confidently affirm'd by the Advocates of the Equity-Juriſdiction of the *Chancery*; that the Kings of *England* anciently, and at the firſt, did Adminiſter Juſtice, and more eſpecially did mitigate the Rigour of the Law, by Equity, in their own Perſons alone; and afterwards did delegate the ſame Power of Equity to a ſingle Perſon, (the Chancellor) who (as they phraſe it) hath the diſpenſing of the King's Conſcience, as well as the Cuſtody of it: And that, to the King alone, in ſuch Caſes, an Appeal doth lie; which, by what hath been already ſaid, is manifeſtly untrue, as ſhall yet be further made out.

* *See Sir* Edward Coke's 2 *Inſtit. in the Chap. of* Articuli Cleri. *fol.* 601, 602.

Sir *John Forteſcue* (who was a Lord Chancellor) in his Book *De laudibus Legum Angliæ*, *pag.* 64. ſays, to Prince *Edward*, (Son to King *Henry* VI) *proprio ore Nullus Regum Angliæ Judicium proferre viſus eſt, & tamen ſua ſunt omnia Judicia regni, licet per Alios ipſa reddantur.* Juſt as all our Laws are ſaid to be the King's Laws; not that he hath the ſole Legiſlature, (as Sir *Robert Filmer* doth weakly, or rather wilfully, tho groundleſly infer;) but *Denominatio ſumitur à Majore*, as is moſt frequent

in

in common Uſe; it is but an Embrio till he quicken it by paſſing the Bill.

In the next place, Let us enquire at what time, and by what occaſion, this Juriſdiction of the *Chancery* in Equity began; by which it may appear, whether it be Entitled to it, either by Preſcription, or by Act of Parliament, for *Non datur Tertium*. The ſame Proofs and Authorities will ſerve to manifeſt theſe: 17. *H.* 7. *Keilway* 42. *b.* by *Vavaſor*. The *Sub-Pænâ* began in the time of *Edw.* III. and that (ſays he) was againſt the Feoffee upon Confidence, that is, to Uſes. Mr. *Lambert*, who was a Maſter of the *Chancery*, (Sir *Edward Coke* 2 *Inſtit.* 552,) in his *Archeion. pag.* 72,74,75. ſays, that the Kings uſed to refer matters in Equity to the Chancellor, (from whence the Chancellor was anciently Styled (*Referendarius*) as was noted before) or to him, and ſome other of the Council. And tho' this doth not, (as he obſerves) plainly erect any Court of Equity; yet (as he ſuppoſeth) it is the laying the firſt Stone of the *Chancery* Court: and *pag.* 73. That in the time of *Edward* III. it was a *Newly Erected Court*, which may be underſtood of its Latin Pleas. The Book called, *The Diverſity of Courts*, written in the Reign of King *Edward* III. Treats of the Juriſdiction of the *Chancery*, according to its ordinary Power, which are the Latin Proceedings, or by the Rules of the Common Law; but ſays nothing of that which the Chancellor holdeth in Equity. *Et quod non invenis uſquam, eſſe putes nuſquam.* It was enabled to deal in ſome ſpecial and particular Caſes by Parliament, which were but Temporary neither; which proves, that in ſuch or in the like Caſes, the Chancellor could not meddle without the help of Acts of Parliament: Nor were thoſe Caſes referred to his Equitable or Arbitrary Power neither, as ſome miſapprehend. For Sir *Edw. Coke* 4 *Inſtit. fol.* 82. ſays, That Acts of Parliament giving Power to the Chancellor to hear and determine Cauſes in *Chancery*, are ever intended of the Court of Record, there proceeding in Latin, *Secundum Legem & conſuetudinem Angliæ*, which Power is not conteſted. And Mr. *Lambert*, *pag.* 74 *ut ſupra*, ſays, he does not remember, that in our Reports of the Common Law, (in which Reports, under the Titles of *Conſcience*, or *Sub-Pæna* in *Fitzh.* or *Brook's* Abridgment, many Caſes of Equity in the *Chancery* may be found) there is any mention of Cauſes before the Chancellor for help in Equity; but only from the time of King *Henry* IV. in whoſe days, by reaſon of thoſe inteſtine Troubles between the Two Houſes of *York* and *Lancaſter*; Feoffments to Uſe did either firſt begin, or firſt grew common; for Remedy in which Caſes chiefly, the *Chancery* Court was then fled unto.

No Reports of Cauſes in Equity in the Chancery, before the time of K. H IV.

The Time.

The Occaſion.

No

No Book-caſe, (ſays that great Champion for the Common Law, Sir *Edward Coke*, 2 *Inſtit.* 552.) nor Reports of the Law, make any mention of any Court of Equity in the *Chancery* uſed, before, or in the Reign of King *Henry* V. but they ſpeak of the Chancellor's ordinary Juriſdiction, which is at the Common Law, and by Latine Proceedings; which proves they were very rare at that time.

Uſes of Land.

The few Cauſes heard by the Chancellor, in the Reigns of King *Henry* VIth and *Edward* IVth, in Equity, by *Engliſh* Bill, are moſt of them concerning Uſes of Land. And how great an Invaſion that new Invention of Uſes was upon the Laws of *England*, (both the Common Law and the Statute Law,) and how pernicious they have been to Men's Eſtates; and what occaſion they have been of Contention and multiplying Suits, ſhall appear by what follows; See Doctor and Student, *pag.* 71. to that purpoſe. Sir *Edward Coke*'s 2 *Inſtit.* 553. affirms, That no *Act of Parliament* printed, or unprinted, gave the Chancellor any power to hold any Court of Equity. The Stat. of 36 *Edw.* III. *Cap.* 9. without queſtion, (ſays that Grave and Reverend Judge, and true lover of his Nation) refers to the ordinary power of the Chancellor; but gives him no ſhadow of any *Abſolute Power*, (meaning a Power of Equity.) See the 2 *Inſtit. fol.* 553.

No Act of Parliament gives the Chancellor, the power of Equity.

See that remarkable Caſe of Sir *Richard le Scrope*, in Sir *Robert Cotton*'s Abridgment of the Records of the Tower, *pag.* 351. *Numb.* 10. (exceeding pertinent and uſeful in many reſpects to our preſent Enquiry, and gives great light to us in many things). It is mentioned alſo in *Coke*, 2 *Inſtit.* 553. it happened *Anno* 17 of King *Richard* II. *John de Windſor* complain'd by Petition to the King, againſt Sir *Richard le Scrope*, and Sir *John Liſley*, for detaining divers Mannors in *Cambridgſhire* from him; to which, (as he alledged), he had a Right and Title. Both Parties ſubmitted the matter to the King's Arbitration; The King committed it to the Council, (not to the Chancellor alone,) the Council decreed it for *Windſor*, (then Plaintiff,) under the Privy Seal; they ſent to the Chancellor to confirm that Decree or Award, under the Great Seal; which was done, and a Special Injunction to Sir *John Liſley*; and a Writ to the Sheriff to Execute it; (A ſtrong Caſe in all its Circumſtances). Sir *John Liſley*, one of the Defendants, not ſatisfied with the Decree or Award, Petitions the King in Parliament; that is, Appeals from it, and prays the Matter may be determined at the *Common Law*, notwithſtanding the Decree or Award ſo confirm'd. The King by Privy Seal, Orders the Chancellor to *Superſede* the Injunction, and the Writ and Decree. The Decree was revers'd, and

Sir Richard le Scrope, or John de Windſor's Caſe.

both Parties order'd to ſtand to the Common Law; and *Windſor's* Petition was diſmiſſed. Sir *Edward Coke* ſays, that this Decree ſo made by the Council, was the firſt Decree in *Chancery*, that he could find; and that upon a deliberate hearing of the whole matter, by the Lords in Parliament, it was adjudg'd, that Sir *John de Windſor* ſhould take nothing by his Suit, but ſtand to the Common Law; that is, (according to our now uſual Language,) His Petition or Bill in Equity was diſmiſs'd, and the Parties ſent to the *Common Law*. I deſire that both theſe Authorities laſt cited, may be compared together, *viz.* Sir *Robert Cotton's Abr.* and Sir *Edward Coke's* 2 *Inſtit.* 553. the one gives light to the other; *Juncta juvant.* This Inſtructs us in the method of Proceedings in Equity, uſed in the time of King *R.* II. and moſt likely in the times preceding: Not to the Chancellor alone, but to the King himſelf, to be referr'd to the Councel. And the Caſe of Sir *Richard le Scrope*, was in a matter where there was remedy at Law, (ſo that they were out of their way, in Petitioning to the King in it); and therefore the Decree was revers'd by the Lords in Parliament, before whom the Appeal did properly lye; nor would the Lords themſelves determine it upon the Merits of the Cauſe; *viz.* who had the right, but referred the Parties to the Common Law, to the right courſe; and yet it was a Decree made by the Submiſſion of all Parties to the Arbitration. So ready were the Lords at that time to do right to the Common Law: Sir *Edward Coke* ſays, this was the firſt Decree made by the Chancellor in the *Chancery*, who did, (as it ſeems) *in limine titubare*, (ſtumble at the very Threſhold); which (ſome ſay) is ominous. The Proceedings in this Caſe of Sir *Richard le Scrope*, was (as I find) when *Thomas Arundel*, Biſhop of *Ely*, and afterwards Archbiſhop of *Canterbury*, was Chancellor; who, no doubt, did much influence the King and Council, in making the Decree.

The firſt Decree in Chancery was reverſed, and the matter left by the Houſe of Lords, to the Common Law.

They have been Churchmen, and divers of them of the higheſt rank, (Cardinals,) who are upon good ground ſuppoſed to be the firſt Setters up, and promoters of this abſolute Power in *Chancery*; the Chancellors generally in thoſe elder times, being of the Order of the Clergy.

The Churchmen were the firſt Setters up of a Juriſdiction in Chancery, in matters of Equity.

And they began (as is uſual in beginnings) with great modeſty, and to exerciſe their Power in ſome few Caſes, which failed of ordinary help; and when Parliaments were not ſo frequent as formerly, to whom recourſe ſhould have been, and who would have cenſured ſuch aſſuming of new Juriſdictions, (as they afterwards very frequently did). And the Setters up of this new Juriſdiction, would not at firſt adventure to do it by One ſingle Perſon alone, tho never ſo high, but with the Concurrence

The Judges were at firſt wont to be conſulted with by the Chancellor.

currence of the Judges; and they too, not ſent for into the *Chancery*, to attend and aſſiſt the Chancellor; but thoſe new Caſes of Equity were ſent into * the *Exchequer* Chamber, where the Chancellor himſelf reſorted to the Judges, with their Cauſes in Equity; and theſe are many of them reported in our Year-Books of thoſe times. And thoſe Cauſes were conſtantly determin'd by the opinion of the Judges; and this method took off the Judges, (whoſe Superiour the Chancellor was, in Dignity and Grandeur) from oppoſing that new Juriſdiction, by granting Prohibitions to ſtop the Proceedings of the *Chancery* in ſuch Caſes, as it was their Duty to have done.

* See Fitzh. *Abr. tit. Sub-Pœna*; and Brook's *Abr. tit. Conſcience, and Paſc.* 22. *E.* 4. 6. *Pla.* 18.

See Mr. *Selden*'s Notes upon *Fleta*; How the Clergy, (who anciently had their Sole dependence upon the Biſhop of *Rome*, and held themſelves not Subject to the Temporal Power,) ſtill promoted and endeavoured to introduce the Civil Law into this Realm, but yet were ſtill withſtood by the Lords and Commons, who were always hearty Friends to the Common Law. Sir *Edw. Coke*'s 2 *Inſtit. fol.* 626. at the end of that folio, it is ſaid, in the Indictment againſt Cardinal *Wolſey*, and charged upon him, that he intended *Antiquiſſimas Angliæ Leges penitùs ſubvertere, & enervare, Univerſumque hoc Regnum Angliæ, & ejuſdem regni populum Legibus Imperialibus, vulgò dictis Legibus Civilibus & earundem Legum canonibus, imperpetuum Subjugare & ſubducere*, &c. Cardinal *Wolſey*'s being in the height of Favour and Authority with King *Henry* VIII. hated both Parliaments, and the Common Laws; and he was the means that but one Parliament was holden in Fourteen Years.

The Common Law was the true Natural and Original Law of *England*, uſed ever ſince the departure of the *Romans*, and brought in by the *Engliſh Saxons* again; *Qui ſuis tantummodò quas ſecum, è Germaniâ* (whether they had tranſplanted them) *attulerant, Moribus uſi ſunt*, only their ancient Cuſtoms, and no other. *Cæſarei Juris* (ſays learned *Selden*) *uſus plane reperitur Nullus per Annos amplius Septingentos*, (more than 700 years). There was no *Chancery*-Law to determine matters of fact, (*a a*) much leſs titles of Freehold, by Depoſitions of Witneſſes only, or by an Abſolute or Arbitrary Power, in all that time of 700 years. No Man was ſuffer'd to have a Civil Law Book in his keeping: King *Stephen* by his Edict did forbid it. The *Saxons*, *Danes*, and *Normans* owned no other Law, than that Law which *Anglorum Commune vocitamus*, ſays the famous *Selden* in his *Diſſertatio ad Fletam*, *pag.* 502, 503, 505, 506, 508. And *Johannes Balæus* tells us, that *Theobaldus Cantuarienſis Archiepiſcopus quaſdam Leges in Angliam attulerat, ſed eas, ut Reipublicæ nocivas, Rex Stephanus perpetuo Parliamenti*

The Common Law, the only Law in England, *anciently.*

(a a) *Dr. and Student, pag.* 15. *by Jury, and not otherwiſe.*

The Books of the civil Law introduced into England *by the Clergy, are commanded to be burnt.*

menti Decreto damnavit, delevit, incendi fecit. The Common Law was in King *Stephen*'s time, and before (ſays *Selden*) the Study of Men that were otherwiſe Learned too. *Sed Moribus Majorum tantum, patrioque utebantur illi Jure; quòd & ante & ad noſtra uſque tempora Angliæ Commune vocitatur*; and their Studies were furniſhed with the Preſidents of Judgments, and Copies of Reports of Law-Proceedings, like thoſe of our Year-Books; and no other were cited in their Courts. And the Students and Reſidents at the Inns of Courts, who afterwards were the Countors or Pleaders, were not Clerks or Sollicitors, (as many now adays are, to the declining of that Noble Profeſſion), But the Sons of Noble Men, and of the beſt of the Gentry, as we read in Sir *John Forteſcue*, in his Treatiſe *De Laudibus Legum Angliæ.*-----*Juris Anglicani* (ſays Excellent *Selden*) *ut Supra* 537. *quod Commune vocitamus quæ Gentis hujus Genio ab intimâ Antiquitate adaptatum fuit, Singularis æſtimatio, atque inde, non immeritò, in eodem adhæſio conſtans, & ſane pertinax.*

The Nobility were anciently the Students of the Common Law.

In that great queſtion, (ſays *Selden* in his *Diſſertation, ib.* 539.) concerning the right of Succeſſion to the Crown of *Scotland*, referred by all Parties and Pretenders to the Deciſion of our King *Edward* I. *Anno Regni* 19. *& Anno Dom.* 1292. about which they met at *Norham*, in the Biſhoprick of *Durham*. It was Debated as a *Præliminary*, whether it ſhould be judged and decided by the Law of *England*, or of *Scotland*, or the *Cæſarean*, or Civil Law, as being the *Jus Gentium*; (ſee *Riley*'s *Placita Parliamentaria*, 143. in the middle of that Page,) our King *Edward* I being the Soveraign or Superiour Lord of *Scotland*: It was concluded before *Roger de Brabazon*, (a Judge of the *King's-Bench*; Sir *Edw. Coke* ſays, *Ch. Juſtice*, 2 *Inſtit.* 554.) the King's Delegate or Subſtitute, for that Great and Noble Occaſion; That the *Cæſarean* or Civil Law, ſhould by no means be allowed of: *Nè inde Majeſtatis Anglicanæ Juri, fieret detrimentum.* And *Selden*, ſpeaking of the Civil Law, *pag.* 540. *ib.* ſays, about King *Henry* IIId's time, *Jus Cæſareum* was newly brought in, *Et à nonnullis, maximè ex genere Hieratico, proculdubio perquàm adamatum, atque præ Anglicano in pretio habitum.* See that admirable and right *Engliſh* Preamble, to the Stat. of 25 *H.* VIII. *Cap.* 21. What Laws only are binding to this Nation, *viz.* none, but thoſe Laws which the People of *England* have taken at their free Liberty, by their own Conſent to be uſed amongſt them, as the cuſtomed and ancient Laws of this Realm, originally eſtabliſhed, and none otherwiſe: Not any new Rules deviſed, *ex re natâ*, at the Diſcretion of any one Man, tho never ſo Great, or Wiſe, or Learned; but never

conſented

conſented to by the Nation, and from the firſt appearance of them, declaim'd againſt by ſeveral Acts of Parliament, and by a multitude of Petitions of the whole Commons in Parliament, complaining of their Proceſs as a Novelty, began at firſt but about *Richard* II. or *Henry* IV. time; a time of great Troubles. See to this purpoſe *Cott. Abr.* 2 *H.* 4. *Nu.* 69. 3 *H.* 5. *Nu.* 46. 9 *H.* 5. *Nu.* 25. *Roll. Abr.* 26. *par.* 1. *fol.* 371. *D. nu.* 2. Yet let me here obſerve one thing more by the way, namely, that from theſe beginnings here, of the Chancellor's Power, tho ſo reſtrained as we ſee, by the ſeveral particular Acts of Parliament that gave them: Occaſion was taken afterwards to Engroſs the Power of Equity, and to take it from the higheſt Court of the Nation: And thoſe that plead for it, do without all ſence or reaſon, aſcribe it to ſome few Acts of Parliament, that referred ſome particular Caſes to him, as fairly giving him the power; whereas thoſe Acts of Parliament manifeſtly ſhew the contrary. *Utcunque verò*, (ſays Sir *Henry Spelman*,) *ſe res habuerit, ſiquidem vel Exutis ſociis, vel cedentibus* (ſhaken off, ſitting ſilent, or weary of being Mutes) *apud ipſum Unicum*, (meaning ſtill the Chancellor) *remanſit tandem Juriſdictio.* It ſo came to paſs, that he could not well tell how, that the Chancellor graſp'd it all, and ſhook off his Aſſociates, or they prov'd Deſerters. And one Act of Parliament more Sir *Henry Spelman* mentions, *viz.* 36 *E.* 3. *Cap.* 9. as truſting the Chancellor ſingly; but it hath been already ſhewn, that the matter ſo intruſted by that Statute, had no reference to Equity, nor indeed to any Judicial power to be exerciſed by him, but meerly as miniſterial rather, directing Remedies by Writs, in order to a Deciſion by a Legal Courſe, and by the Common Law. He proceeds farther, *viz.* *Aſcitiſque & protractis in Cancellariam pluribus quam Juſtum videbatur*; *Populus* (meaning the Commons in Parliament) *ad eandem cohibendam Legem rogat, non autem tulit, ſed benignè à Rege reſponſum eſt*, (as was wont) *mandaturum ſe id parciùs fieri quam priùs ſolitum.* This was 4^to^ *H.* 4. about which time the Chancellor firſt began to arrogate to himſelf this power, (as ſhall be more fully ſhewn hereafter.)

The H. of Commons conſtant oppoſers of the Equitable Juriſdiction of the Chancery.

See Sir *Rob. Cott. Abr. pag.* 410. 2 *H.* 4. *Nu.* 69. a Petition of the Commons againſt the very Original Proceſs of *Sub-Pœna*, that it might no more be uſed; and that the Subjects might be treated according to the rightful Laws of the Land, anciently uſed; ſee *Rolles's Abr. part* 1. *fol.* 370. more at large. And that this Proceſs was illegal, appears by another Petition of the Commons, 4 *H.* 4. *Nu.* 78. *Vid. Roll's Abr. ut ſupra.* The Commons in their Petition 4 *H.* 4, *Cott. Abr. Nu.* 78. pray, that

And of the Proceſs by Sub-Pœna.

the Suggeſtions made in *Chancery*, may be tryed by a Jury; and if they be found falſe, that the Jury may give the Defendant damages: And that the Plaintiff, before he be allowed to take out a *Sub-Pæna*, may find ſufficient Surety to anſwer ſuch Damages; which ſhews the good Opinion the Nation had of Juries.

The Petition of the Commons, 4 *H.* 4. *Nu.* 110. intimates, that all the Eſtates of the Realm, were in danger by the *Chancery*-Proceedings, and they pray remedy for God's ſake. It is very uſeful and pertinent alſo, to ſet down what further Sir *Henry Spelman* mentions: *Simile quiddam* (ſays he) *agitatum ferunt in Parliamento, Anno primo* of King *Henry* VI. *Sc. Neminem ad Cancellariam provocaturum, cui duo Juſticiariorum Regis non ferrent teſtimonium haud Subvenire Legem Terræ.* Two Judges of the Common Law, (which is call'd the Law of the Land, in diſtinction from the Chancery-Rules,) were to make way for every Bill in *Chancery*, by their firſt certifying, that the Plaintiff had no Remedy at Law: which was an excellent expedient, and worthy to be made a Law by a ſhort Act, to be paſt for that purpoſe.

The Judges of the Common Law, who are Sworn to maintain the Law, were thought the moſt competent, and worthy to be entruſted in it; and not look'd upon as partial and unindifferent, which is a Scandalous Reflection upon the Government and Conſtitution. See the 2 *Inſtit.* of Sir *Edw. Coke*, *pag.* 544. there is a Writ directed by King *Edw.* II. to the Judges of the King's-Bench, in theſe words: *Vos Locum noſtrum in placitis teneatis & noſtram præſentiam ſupplere debeatis*; and in the Caſe of *Walter de Langton*, *ib. fo.* 573. *Contemptus miniſtris domini Regis facto eidem Domino Regi inferuntur*, ſays the Record, in the 33th year of King *Edw.* I.

It appears, that the Chancellor could not Act, no, not in many ordinary Matters, till enabled by the Parliament. See 14 *E.* 4. *fo.* 1. *Brook Abr. Tit. Brief. plac.* 483. and then his Power was limited, and he alone was not entruſted, but he had an Aſſociation of others. *Quantum mutatus ab illo!* It farther ſhews when he began to enlarge and aſſume a greater Power, and how unwarrantable it was in his firſt Exerciſe of it, not grounded upon any good Authority; for we ſhould have been ſure to have heard of it in the King's Anſwers to the Petitions of the Commons againſt it, (as was conſtantly uſed upon ſuch Petitions, where there was any Law to warrant what was ſo complain'd of;) had there been any, either Preſcription or Act of Parliament, the Chancellor being conſtantly the chief Perſon among the Tryers of Petitions in Parliament, and framing

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the Anſwers of thoſe Petitions in Parliament; together with the Biſhops, Lords and Judges, which of late hath been wholly diſuſed.

And laſtly, it proves how early this new Juriſdiction of the Chanceries Proceeding in Equity, was decry'd and exclaim'd againſt, not only for the Abuſes in the Adminiſtration of it, but for uſurping a Juriſdiction, not founded upon any good Authority, and carried on by the Potency and Greatneſs of the Chancellor. Nor was there any the leaſt pretence of any Preſcription or Act of Parliament, to ſupport it: Nor was it taken to be any part of the Law of the Land, or of the Common Law, tho taken in the largeſt ſence; but rather *contra*-diſtinct, and indeed oppoſite to it, and deſtructive of it.

Sir *Henry Spelman* at laſt takes leave of this great Officer, and of his Court, by ſhewing what a mighty encreaſe came flowing in from that ill *Weed*, (*the Invention of Uſes or Truſts*, which are ſtill the ſame.) But to this point there are plenty of far greater Authorities and Authors, for whoſe Teſtimony herein I ſhall reſerve it.

Another thing to be premiſed, is, that as the King had no ſuch Power himſelf ſingly, and in his own Perſon only, to decide Cauſes of Equity, and therefore could not Delegate it to any one Man, (as 'tis pretended he might;) ſo, and upon the ſame ground and reaſon, the King by our Law could not by his Commiſſion, Erect any Court of Equity. It can be grounded and warranted only upon a Preſcription, or an Act of Parliament; neither of which can be pretended to, in the matter in hand; it was ſo adjudged 26 *Eliz.* in the King's-Bench. Sir *Edw. Coke* 4 *Inſtit. fol.* 87, & 97. That a Court of Equity cannot be Erected, but only by Act of Parliament, or Preſcription. And the like in the Lord *Hob. Rep.* 63. Reſolv'd alſo in *Marmaduke Langdale's Ca.* 12. *Rep.* 52. That the King cannot raiſe a Court of Equity: the reaſon is, becauſe a Court of Equity proceeds by the Rules of the Civil Law, and not by the Common Law. 6 *Rep.* 11. *b.* and 2 *Inſtit.* 71. The King may appoint a new Court, and new Judges, but cannot change the Law. *Hill.* 8. *H.* 4. *fol.* 79. by *Gaſcoign*, That the King by his Charter cannot out the People of their Inheritance, which they have in the Common Law: So note, the Common Law is the People's Inheritance.

There can be no Juriſdiction in Equity, but either by Preſcription or Act of Parliament; not by any Charter, or Commiſſion from the King.

In the next place, Let us proceed to examine about what time, and upon what occaſion, this Court of Equity exerted its Power, which hath in part fallen in among our former Enquiries. For the time and occaſion too, Mr. *Lambert* in his *Archeion, pag.* 75. refers it to the time of King *Henry* IV. and the

the occaſion was taken from Feoffments to Uſes: For remedy in which Caſes the *Chancery* was fled unto: With this agrees Sir *Henry Spelman*, in his *Gloſſary*, *pag.* 107. at the lower end *Doctor and Student*, *fol.* 98. Sir *John Davy's Rep.* in his Preface; Mr. *Hunt's* Argument for the Biſhop's Right, *&c. pag.* 144.

What Equity *meant anciently.*

And to prevent miſtakes herein, it muſt be obſerv'd, That the word *Equity*, hath been very anciently uſed, (long before this Juriſdiction began in *Chancery*,) but not in a Contradiction, or in Oppoſition to the Common Law of the Land, (as now it is;) but either in a mild and merciful Expounding of the Law, by the known and ſworn Judges of the Law; or as ſynonimous, and ſignifying the ſame thing as Law, Juſtice and Right. For the Laws of *England* were not looked upon then, as being like the Laws of *Draco*, Sanguinary and Cruel, and Rigorous, but merciful and equitable in themſelves, and ſo expounded and adminiſtred by the Judges of the Common Law. *Mulcaſter* the Tranſlator of the *Chancellour Forteſcue*, being a Student of the Common Laws of *England*, in the Reign of King *H.* VIII. could readily obſerve to his Reader, from his Study of thoſe Laws, and from the Arguments uſed by his Author (the Excellent Sir *John Forteſcue*,) *Eaſdem noſtras Leges non ſolum Romanorum Cæſarum, ſed & omnium aliarum Nationum Conſtitutiones multis paraſangis prudentiâ Juſtitia & equitate præcellere facilè perſpicias.* See his Preface. *Non quod principi placet, Legis vigorem habet, non quicquid de voluntate Regis*, tho his Will be not Arbitrary neither, but guided by Diſcretion, and tho he define *ſecundum æquum & bonum*) *ſed quod Magnatum ſuorum Concilio* (*Regiâ authoritate præſtante*) *& habita ſuper hoc deliberatione, & tractatu rectè fuerit definitum.* So writes *Bracton*, *Lib.* 3. *Cap.* 9. *fol.* 107. and ſo *Britton*, Sir *Gilbert Thorneton*, (*Ch. Juſtice*, in the time of King *E.* I.) and Sir *John Forteſcue* Chief Juſtice, and afterwards Chancellor: Theſe invincibly prove the Nature of our Laws. The Kings of *England*, were from the firſt Foundation of the Government, Sworn to obſerve the old known Laws of the Realm, which were called *Uſus & Conſuetudines Regni*, and that they would not ſuffer any Innovaſion, which was often attempted by the Pope and his Clergy, who endeavoured to introduce into this Realm, the Civil and Canon Laws.

King *Henry* I. writing to the Pope upon ſuch an occaſion, tells the Pope ſtoutly, *Notum habeat Sanctitas veſtra, quod me vivente, Uſus Regni Angliæ non imminuentur. Et ſi ego in tanta me dejectione ponerem, Optimates mei & totus Angliæ populus id nullo modo paterentur.* And all the Nobles of *England*, by Conſent

Consent of the Commons, wrote to Pope *Boniface* upon the same occasion, *Non permittemus tam insolita & tam indebita, Dominum nostrum Regem (etiamsi vellet) facere, seu quo-modo-libet attemptare.*

The Lord Chancellor, and Lord Keeper is also Sworn to do Right to all, after the Laws and Usages of this Realm, (not *secundum æquum & bonum*, nor other Rules of Equity.) 2 *E.* 3. *fol.* 20. It is said in that Book, by the Chancellor sitting in the *Chancery*, and speaking of that Court; This, (says he) is a place of Equity, where we grant a Writ to every one that Sues for his Inheritance. So that to issue out Writs, as *Officina Brevium*, is by the Chancellor's own acknowledgment, a proper work of Equity. It seems to be the only use of the word (*Equity,*) at that time, 2 *Instit.* 53.

What is meant by Equity, *in the true sence of it.*

The *Civilian Vinius* in his Comment upon *Justinian*'s *Institutes*, *pag.* 20. *Nomen Æquitatis* (says he) *duplicitèr accipitur, vel in genere pro æquo, quod cum omni jure conjunctum est: vel in specie pro eo quod est à Jure Civili diversum. Omnibus Legibus æquitas inesse creditur. Nomenque juris non meretur, quod ab omni Æquitate destitutum est.* He mentions no Equity contrary to Law, or to Controul the Law; nor any other than what was to be exercised by the very Judges of the Law themselves, in all Cases that came before them. *Plowd. Comment.* 466, & 467. In the Case of *Eyston* and *Studde*, it is said, No Makers of Law can forsee all things that may happen, and therefore it is convenient, that the fault be reform'd by Equity. This the Chancery-men will catch at, as making much for their practise of relieving in such unforeseen Cases, where the Law looks severe and rigorous. But the Case cited proceeds further, and makes not at all for the *Chancery*, if it be heard out. And, the Sages of our Law, have deserved great Commendation, (says that Case,) in using Equity in Cases of Rigour, in the words of a Law; for by that they have mollified severe Texts, and have made the Law tolerable. Who are meant generally in our Law-Books and Arguments, by the * Sages of the Law, but the Judges, to whom by Law belongs the Construction of the Acts of Parliament and the pronouncing of our Laws? See the 2 *Instit. fol.* 611. The Judges in their Answ. to the 16th Objection, & 614, & 618. the Judges only are to expound Acts, tho they concern Eccleſiastical Jurisdiction: Here is no need of a distinct Court of Equity. Such a Case of Equity was that of *Reniger* and *Fogassa*; the first Case in *Plowd. Comment.* tho determin'd by a Privy Seal, it being in the King's own Case, concerning the Customs. There is another Equity, says that Case of *Eyston* and *Studde* in the Comment. which differs

* *By the Stat. of* Articuli super chartas, *cap.* 5. *in anno* 28. *E.* 1 *The Judges are called, the* Sages of the Law.

much from the former, and may be thus defin'd. *Equitas eſt verborum legis directio, efficiens cum una res ſolummodo legis cavetur verbis, ut omnis alia in æquali genere eiſdem caveatur verbis.* As for inſtance, the Stat. of 9 *E.* 3. *Cap.* 3. which gives an Action of Debt againſt Executors, ſhall be extended by Equity to Adminiſtrators, (tho not within the words.) But this alſo is done by the Judges of the Common Law. Here is no mention of a Chancery-Equity; and it had been (according to the right Rules of Logick,) no good Diviſion, if it had not taken in all the parts, called the *Membra Dividentia*, which ought to be *Toti adæquata*, *Keckerm. Syſtema Logicæ*, *pag.* 245. *regula quarta*; Doctor and Student, *pag.* 27, 28. Equity is to be exerciſed in the mild and merciful Conſtruction of a Law; and in ſome Caſes departing from the ſtrict and rigorous words of a poſitive Law, rather than oppreſs any Man by it, which is not by appealing from that Law, or from the Court where that Law is adminiſtred; but reſorting from the Letter, to the true intent and meaning of the Law, and the true mind of the Makers of the Law. *Ubi aliud ſuadet neceſſitas, ceſſat humanæ conſtitutionis vigor, ceſſat & voluntas Nomothetæ.* But this is the Duty of the Judges of the Common Law, and to be done in the ſame Court, and in the ſame Suit and Action; and not in another Court, and by a new Suit, under pretence of Equity; for that were to cenſure the Law, and the Judges of the Common-Law Courts; and to charge the Law-makers, either with Ignorance, or over-much Severity, which is not to be ſuffered: And this (ſays St. *Germin*, the Author of that Treatiſe) is ſecretly intended and underſtood in every general Rule, of every poſitive Law, according to what is before remembred in this Diſcourſe, out of the Caſe of *Eyſton* and *Studde*, in *Plowd. Comment.* and what is ſaid by the Author of Doctor and Student, *pag.* 27. Laws, ſays he, *covet* to be ruled by Equity, which is not meant meerly to be done in another Court, Proceeding by Equity, but by an equitable Conſtruction of the Law, in the Court of the Common Law, as appears *pag.* 28. *b.* the latter end of that Chap. And thoſe Equitable Conſtructions are there called *Reaſonable Exceptions of the Law*, and hold as well in Caſes at Common Law, as upon Statutes, (as appears by the Caſe there put at Common Law,) *pag.* 29. *Cap.* 17. and on the *b.* ſide of that page, *in medio*, it is ſaid, the Parties ſhall be relieved in the ſame Court, and by the Common Law, *Plowd.* 88. *b.* & 205. *b.*

Thus in the Expoſition of a Statute, Judges depart from the words of the Law, rather than run into an abſurdity or inconvenience, by a too literal Expoſition, (as in the Caſe upon the

Stat.

Stat. of *Marlbr.* concerning Diſtreſſes.) The Judges, *Hill.* 30. *E.* 3. gave Judgment againſt the expreſs words of that Stat. tho the words were in the Negative too, as is obſerved in the argument of *Reniger* and *Fogaſſa's* Caſe. In *Plowd. Comment. fol.* 9. *b.* and it is a Rule in the expoſition of Statutes, many times to depart from the words, to meet with the mind of the Law-makers, whoſe intent (as it muſt be preſum'd) is to do no Man wrong. See in the ſame Caſe, in *Plowd. fo.* 10. and in the ſame Book, *fol.* 57. *b.* 199. *b.* & 203. Laws expounded not only different from the words, but contrary to them, rather than do any Man wrong. Such ſence is to be made of the words of an Act of Parliament, as may beſt ſtand with reaſon and equity, and which moſt avoids rigour and miſchief.

Plowd. 364. *a.* in the Caſe of *Stowell* againſt the Lord *Zouch*, It is ſpoken there by one or more of the Judges: Some Caſes by neceſſity in Conſtruction, are to be excepted out of a Stat. 2 *Inſtit.* 25. Many Caſes may be within the Letter, yet not within the meaning of an Act, 2 *Inſtit.* 107. *in Principio*, 110, & 111. and general words of a Stat. may be reſtrained by Conſtruction, 2 *Inſtit.* 502. and the Expoſition of Statutes belongs to the Judges of the Common Law, 2 *Inſtit.* 618. *Hill.* 13 *Jac.* 1. in the King's-Bench, *Vaudry* and *Pannell's* Caſe, *Rolles's Rep.* firſt part, 331. It is there ſaid, that if a Court of Equity made a falſe Sentence, it may be revers'd by the King; that is, by his Commiſſion; for *Mic.* 42, 43, *Eliz.* in a Suit in *Chancery*, by the Counteſs of *Southampton*, againſt the Lord of *Worceſter* and others, for the Mannor of *Henningham*: It was reſolv'd by all the Juſtices under their hands, (which is now in the *Chancery*,) That when a Decree is made in the *Chancery*, upon a Petition to the Queen, ſhe may refer it to the Juſtices, (but not to any others,) to examine and to reverſe it, if there be Cauſe; and the Lord Chancellor agreed to this Reſolve; and upon ſuch a Petition and Reference, the Decree made in that Caſe in *Chancery*, was revers'd by the Juſtices. This was in time before any Conteſt between the Two Juriſdictions, *viz.* in Queen *Elizabeths* time, and before the Judges were look'd upon as not indifferent.

The Judges of the Common Law, are to review and reverſe Decrees in Chancery.

It appears 3 *H.* 5. *Nu.* 46. That the Commons in a Petition complain, That many were grieved by Writs, which were called (Writs of *Sub-Pœna*,) which they ſay were not uſed, till the time of the laſt King *Richard*: That *John de Waltham*, Biſhop of *Salisb.* of his Subtilty, invented and began ſuch Novelty againſt the Common Law; and that they proceeded upon thoſe Writs, according to the Civil Law, in Subverſion of the Common Law: and they pray, That an Action of Debt of Forty

John de Waltham *Biſhop of Saliſb. the Inventer of the Writ of* Sub-Pœna, *in the wicked time of King Richard* II.

Forty pounds may lye againſt ſuch. See the Record at large, *Roll. Abr.* firſt part, 371. (too briefly Abridged by Sir *Robert Cotton*;) This is of the Nature of a Preſentment, by the Commons of *England*, (the Grand Jury of the Nation,) and it doth invincibly prove and teſtifie the time when this Juriſdiction was firſt ſet up in *Chancery*; for the Writ of *Sub-Pæna* is the firſt Proceſs of that Court, in Caſes of Equity, and 'tis call'd a Novelty, and Names the firſt Inventer (*John de Waltham*) who was Keeper of the Rolls, in the time of King *R.* II. which is now called *Maſter of the Rolles*; but in the time of King *R.* II. it was look'd upon as an inferiour Office, as may be obſerved upon the Supplication of *Will. de Burſtall* in the 1 *R.* II. *Ryley's Placita Parl.* in the Appendix, *pag.* 670. who ſtiles himſelf *A Petit Clerk, Keeper of the Rolles of the Chancery*, and prays his Patent may be confirm'd by Parliament, as a work of Charity. See Sir *Edw. Coke's* 4 *Inſtit. fol.* 95. & 96. *ad finem*: And *John de Waltham* was *Burſtall's* immediate Succeſſor. This alſo ſpeaks the mighty growth of that Court; this *petit Clerk* now takes place of the Chief Juſtice of the Common Pleas.

The Writ of Sub-Pæna called a Novelty, by a Petition of the Houſe of Commons, in the Reign of King Henty V.

Let us hear the Judgment of an ingenious Writer, and a worthy Perſon, Mr. *Hunt* before mentioned, in his printed Argument for the Biſhop's Right, in Judging Capital Cauſes in Parliament, *pag.* 144. One may wonder, (ſays he) That there is nothing in Antiquity, that gives Authority to ſo celebrated and buſie a Court, as the *Chancery* at this day is; none can be able to Cope with it, but the higheſt and Supream Sovereign Power; (he means, I ſuppoſe, the laſt Reſort, the Lords,) and it is the proper work and care of that Court; (and to that Court only, is this addreſs made). It occaſions (ſays Mr. *Hunt*) a multitude of Suits, tedious in delay: The Expences many times equal (ſometimes exceeds) the Value of the Right in diſpute; and (that which is worſe,) the Event is very uncertain. That Court, ſays he, had its Riſe from Feofments made upon Truſt, to avoid Forfeiture to the Crown, in times of Civil War between the Two Houſes of *York* and *Lancaſter*; 21 *E.*4. *fo.*23. *Bro. Abr. Tit. Conſcience, plac.* 21. by *Fairfax.*

It encreaſed from the Nicety of Pleadings, eſpecially in Actions upon the Caſe in the Common Law Courts, and from the Potency of the Chancellor, who commonly made and unmade, ſays he, the Twelve Judges.

If we may give due reſpect and credit to learned Sir *Edward Coke*, and to the Reſolutions of many Reverend Judges, in ſeveral Caſes in ſeveral Kings and Queens Reigns, and allow them to interpret Acts of Parliament, (to whom, out of all doubt, it does peculiarly belong.) We may conclude, That upon ſuch Proceed-

ings

ings in Equity, for matters tryable by a Jury, and eſpecially where a Freehold is concern'd, and where (if there be a right) there is an ordinary Remedy for it. I ſay, upon ſuch Proceedings, be they in the King's Courts Eccleſiaſtical or Temporal, or in a Court of Equity, not only a Prohibition will lye to the higheſt of thoſe Courts, to forbid them, but a *Præmunire* alſo will lie, to puniſh them ſeverely, be they never ſo high; becauſe it brings matters tryable at the Common Law, and of Freehold and Inheritance, *ad aliud Examen*, and to be diſcuſſed, *per aliam Legem*, as ſays Sir *Edw. Coke's* 3 *Inſtit. fol.* 121. in the middle of that *fol.* in the *Chapt.* of *Præmunire*; and the very Statutes made in thoſe Caſes, are Prohibitions in themſelves.

That a Prohibition lies to ſtop a Suit in Chancery. See Mich. 13. E. 3. Fitzh. Abridgment, Tit. Prohibition, plac. 11.

If it were thought convenient, by the Supream Legiſlature, to have any ſuch Power exerciſed in an ordinary and conſtant uſe of it, poſſibly it might better be depoſited in the hands of the Judges, of the ordinary Courts of the Common Law; (whatever Sir *Francis Bacon* ſays to the contrary, in his Advancement of Learning,) which has been ſucceſsfully experimented, as in the late Court of Wards mixed of Law and Equity; and in the Court of *Exchequer*, where matter of Equity, by the *Stat.* of 33 *H.* VIII. *C.* 39. is allowed to be pleaded in the ſame Court and Office, among the Latine Proceedings. But neither of theſe Courts ventur'd upon ſuch a Courſe; no, not to proceed in a Courſe of Equity by *Engliſh* Bill, till enabled to do ſo by Act of Parliament; tho ſome have been of Opinion, that the Exchequer had ſuch an Equitable Juriſdiction by Preſcription. And it is a thing to be admired, that after ſo many Courts ſuppreſſed by ſeveral Acts of Parliament, as that of the Star-Chamber, the Court of the Council, in the Marches of *Wales*, and others; and ſeveral Courts that have very politically ſurceas'd the Exerciſe of their Juriſdiction of their own accord, as not being warranted by Law: as the Court of Requeſts, *&c.* That the Friends to the High Court of *Chancery*, as to the Exerciſe of an Equitable Juriſdiction, have not endeavoured to fortifie their Court with an Act of Parliament, under due and reaſonable Regulation; eſpecially when it once fell, (tho in times of Uſurpation) under a large Correction; which, tho it wanted a good Authority too, yet it manifeſtly ſhews the ſence of the whole Nation, whom the then Uſurping Powers thought it good Policy to gratifie and indulge; for *in peſſimis temporibus*, as well as *ex malis Moribus*, *bonæ oriuntur Leges*, as to the matter of them; as in the ſhort Reign of *Richard* III.

I can appeal to that Higheſt Judicature, (the whole Houſe of Lords,) who have had many years Experience of me, begun

about Twenty Four years since, (for so long ago I was their Assistant,) and to Thousands more, with whom I have had a publick Conversation for about Fifty years, and some for a shorter time; that this is no new, or sullen and revengeful Humour in me, but proceeds from a Love to my Countrey, and Gratitude to mine, and my Ancestors Profession; and from a desire to have my self, and my own Posterity and Neighbours, Free and Happy.

Let me observe from Mr. *Hunt* before cited, that what he writes, doth appear to be the Vulgar and Common Opinion concerning this Court of Equity, (for which reason I cite him.) It points out to us, whether we are properly to resort for a Regulation, (that is to the Lords House,) and (with all Submission and Reverence to that High Court be it spoken,) it is a Trust repos'd in them, to reform this Lesser, (tho commonly call'd *The High Court of Chancery*;) and to keep the rest of the Courts within their due Bounds. As for the Court of the King's-Bench, (to whom it most properly belongs, to grant Prohibitions upon such occasions.) 2 *Instit. fol.* 610. Prohibitions are not of Favour, but of Justice. It is now grown to that pass, through the length of time and disuse, that the Court of King's-Bench might possibly find it, (*Imparem Congressum*) unless encourag'd to it, by that Supream Court of the Lord's House. Observe too, that this Author Mr. *Hunt*, does concur herein with many other Testimonies, when this Court of Equity had its first rise and beginning, and whence it took the occasion of such a Jurisdiction, *viz.* from the Feofments upon Trust, whose beginning too we know, and what the Design and purpose was of such illegal and fraudulent corrupt Feofments, and Conveyances to Uses upon Trust were, we shall further examine, and hear the Opinion and Judgment of several Reverend Judges, and divers Writers besides, upon that Subject, before the close of this Discourse, of which much hath already been said, as from Sir *Edw. Coke*, *Ch. Jus.* (who was a faithful Friend to our Nation and Laws;) Mr. *Lambert*, who was a Master of the *Chancery*, Mr. *Dugdale* in his *Originès Juridiciales*, from the *Ch. Jus. Popham*, in *Chudleigh's Ca.* in the first *Rep.* of Sir *Edw. Coke*, *fol.* 139. *b.* and from the rest of the Judges and Arguers of that Case; whose Judgment as to this point, *viz.* both of the Original of this Jurisdiction of the *Chancery*, and the mischievous effects of those Conveyances, to Uses and upon Trust and Confidence, (for they are all one, and so mentioned in the Act of the 27 *H.* VIII. whose design was to extirpate both,) will more fully appear. 1 *Rep.* 121. *b.* There were (says that Case) Two Inventers of Uses, Fear and Fraud; Fear in times of Troubles and

The Mischiefs from the Invention of Feofments to Uses, and in Trust.

Lamb. *Archeion. pag.* 75. *Dr. and Student*, 98. *Sir* Henry Spelman *Gloss.* 107. Fitzh. *Ab. Tit.* Sub-Pœna, *thro' that whole title, still about Uses,* 2 H. 4. *Cot. abr. Nu.* 69.

and Civil Wars; to ſave Inheritances from being forfeited, (which in Truth and in plain words, was the ſame thing with fraud to evade the Law that inflicted thoſe Forfeitures:) and Fraud, to defeat due Debts and lawful Actions and Duties. Before the time of *Richard* II. (ſays the *Ch. J. Popham*, in that Caſe;) no Act of Parliament, or other Record, nor any Book nor Writing, made any mention of *Uſes of Land.*

Hear the Opinion of the King, Lords and Commons, (the whole Nation) concerning Uſes; in the Preamble of the Statute of 1 *Rich.* III. *Cap.* 1. The makers of that Statute ſet forth the miſchiefs ariſing from ſuch Conveyances to Uſes and Truſts, *viz.* great Unſurety, Trouble, Coſts, and grievous Vexations to the Buyers of Land, or to ſuch as took Leaſes. In the Preamble of the *Stat.* of 27 *H.* VIII. *Cap.* 10. *viz.* That by divers ſubtle Inventions and Practiſes by Fraudulent Feofments, Fines, Recoveries and other Aſſurances, craftily made to ſecret Uſes Intents and Purpoſes, *&c.* Manifold Miſchiefs did enſue. Out of which Statute, both from the Preamble and Body of it, may be obſerv'd, (1°. * That Uſes and Truſts are the ſame things, *Styles Rep. fol.* 21. *&* 40.) 2°. That the intent of the Law-makers, was to extirpate both, as being but the ſame: But we know where Truſts are ſupported, as if they were diſtinct things from Uſes, and a plentiful Harveſt hath ariſen from them; tho it hath been reſolv'd, that an Uſe cannot ariſe out of an Uſe; but this is evaded by giving it the Name of a Truſt, and making them diſtinct things. So that we may learn from what hath been ſaid, when, and whence theſe pernicious things called (*Uſes*) and (*Truſts*) had their Original, and who was the firſt Inventer of the Writs, called Writs of *Sub-Pœna*; all about the time of that Exorbitant and Tumultuous Reign of King *Richard* II. and that ſuch Conveyances ought at firſt to have been adjudg'd void, being fraudulent, as other fraudulent Conveyances have been, by the ſeveral Statutes of 52 *H.* 3. *Cap.* 6. 50 *E.* 3. *Cap.* 6. 2 *R.* 2. *c.* 3. 3 *H.* 7. *C.* 4. 19 *H.* 7. *Cap.* 15. *Trin.* 7 *H.* 6. *fol.* 43. If a Man make a Feofment in fee, *Proviſo tamen*, that the Feoffor ſhall always have the Profits of the Land, that Proviſo is void and contrarious, by *Hankford* a Judge of the Common Pleas, in the time of King *Richard* II.

* *Uſes and Truſts the ſame things.*

Sed Mala perlongat invaluêre mora.

Now, What an abſurdity and contradiction is it in Reaſon, and a mockery and abuſe of the Common Law, That a Man ſhall uſe the juſt and neceſſary Liberty the Law allows him to convey away his Land, but it ſhall be ſo agreed, that he to whom it is conveyed, ſhall not be one jot the better for it, but it ſhall ſtill remain his in point of Profit, that convey'd it away? And ſo it is all but a Deluſion and Deceit, and the

honeſt intention of the Law is baffled by it; But a world of work is made by this for a new Court. The Judges, who are the Conſervators of the Common Law, and of the rights of the People, early decryed theſe Inventions of Uſes, and ſo have ſeveral Acts of Parliament: But the Potency of ſome great Church-men and others, did ſtill own and ſupport them; for they bring great Profit with them to the Juriſdiction.

Under this pretence, and upon theſe occaſions, began the Invention of Uſes and Truſts, which have wonderfully perplex'd and turmoil'd almoſt all the Eſtates in *England*; ſo that Men's Eſtates and Titles are not now ſo much guided and governed by the old, and moſt wiſe and certain Rules of the ancient Common Law, as by new invented Rules, in a new Court, to the ſubverting of the Common Law, and Ruine of many Families.

How much work have they cut out for our Parliaments, by making many Acts of Parliament to redreſs the Abuſes? but the Miſchiefs are inſuperable, and the many good Remedies provided by ſeveral Parliaments have been rendred fruitleſs: and I cannot for my life tell how it hath ſo come to paſs, unleſs by the exceſſive Power and mighty Favour that hath been indulged to the Perſons in that High Office; ſuch as Cardinal *Wolſey*, and others of the Hierarchy, who were formerly in that great Office, and were wont to have a mighty ſtroak in the Government.

By reaſon of theſe Conveyances to ſecret Uſes and Truſts the Lord was Defrauded of his Ward, heriot, and Eſcheat. To remedy this was the *Stat.* of 52 *H.* 3. *Cap.* 6. called the *Stat.* of *Marlebridge*, made, which made ſuch Conveyances void as againſt the Lord; and ſeveral other Statutes to the ſame purpoſe.

The Creditor who ſuppoſed the ſame Feoffor, (he ſtill being in Poſſeſſion, and taking the Profits) to be ſtill the Owner in Law he loſt his debt, till the *Stat.* of 50. *E.* 3. *c.* 6. made the Lands however liable to ſatisfie the Debts; and many Statutes more were made in the like Caſe.

A Man that had cauſe to Sue for his Land, knew not againſt whom to take his Remedy, and to bring his Action: For one Man had the naked Name or Title, like the titular Biſhops of the Church of *Rome*; and another had the Uſe and Profit, till the *Stat.* of 1 *R.* 2. *c.* 9. made an Aſſize maintainable againſt the Pernor, or him that took the Profits.

The Wife was Defrauded of her Thirds.

The Husband of his Tenancy by the Courteſie.

The poor Farmer of his Leaſe.

The

The Crown, of the Forfeiture for Treaſon; whereby Men were more imboldened to commit Treaſon.

The *Stat.* of 1 *R.* 3. *c.* 1. Tho it meant well, yet gave too much countenance to theſe miſchievous Uſes, by making good the Eſtates granted by the *ceſtuyque Uſe*: Whereas, it ſhould rather have ſet a brand upon thoſe Conveyances to Uſes, and have declar'd them all void, as being generally meer Frauds and Cheats; for ſo the Judges were in thoſe times wont ſtill to pronounce them. And that *Stat.* of 1 *R.* 3. deals plainly in the matter, by ſetting forth in the Preamble, the great Unſurety, Trouble, Coſts, and grievous Vexations that daily grew from them; but at laſt, that Statute deals too gently by them.

And ſeveral other like Statutes were made, but to no very great purpoſe; for means were found out to evade them.

At laſt came forth the *Stat.* of 27 *H.* 8. *cap.* 10. and this undertook, and plainly ſo intended, to pluck up this unwholſome Weed by the Roots: Which good Law, firſt reciting the excellent quiet and repoſe that Men's Eſtates had, by the wholſome Rules of the Common Law; but cunning Men had ſought out new Inventions by fraudulent Feofments, and Conveyances craftily made to ſecret *Uſes* and *Truſts*, to the utter ſubverſion of the ancient Common Laws of this Realm, (as the Preamble ſpeaks,) for the utter EXTIRPATING and EXTINGUISHMENT of all ſuch ſubtil practis'd Feofments, Abuſes and Errors; It is Enacted, That the Poſſeſſion of the Land ſhall be in him that hath the Uſe; and that he ſhall have the like Eſtate in the Land as he had in the Uſe.

How ſtrangely hath all this good Intention, Pains and Care been made of little or no effect, and the miſchiefs ſtill continued by a diſtinction ~~inveſted~~ between *Truſts* and *Uſes*, directly againſt the often repeated Clauſes, and manifeſt plain meaning, and expreſs words of this good Act! Inverted

For thô the Judges of the **Common Law** were now by this Act to judge of Uſes, (which before was the work of the Chancery,) they being now converted by this Act into Eſtates at Law.

Yet ſome Men, perfectly to elude this good Act, have confidently maintain'd, aſſerted and allow'd a diſtinction, between an *Uſe* and a *Truſt*.

And thô they are content, (becauſe they cannot help it) that the Judges of the Common Law may determine of Uſes; the Courts of Equity ſhall hold a Juriſdiction in matters of Truſt.

And moſt of the great Eſtates in *England* have, by colour of this, fallen under their determination and controulment, and now have a dependence upon a Juriſdiction of Equity.

Whereas, Were there the leaſt colour left by that Act of 27. *H.* 8. for any diſtinction between an *Uſe* and a *Truſt*, (as moſt certainly and plainly there is none;) yet as certainly and clearly that Act of Parliament meant to extirpate thoſe Truſts, as well as Uſes, as any ordinary Capacity, well peruſing that Statute to this purpoſe, may eaſily perceive. I humbly and heartily beg that favour of every Lord to read over deliberately this *Stat.* of 27 *H.* 8. *cap.* 10. for this very purpoſe; for it will plainly diſcover this groſs abuſe.

As to the length of time, wherein ſuch a Power and Juriſdiction of Equity hath been exerciſed in the Chancery, yet it plainly appears, not to be grounded upon Preſcription, the Original being known, and not ſo very ancient neither; and modeſt too, and moderate at firſt, (as moſt ſuch are in the beginning;) and having from the firſt ſtarting of it, been hunted and purſued with full Cry, and upon a freſh Scent, and in view, and having hardly any Colour of an Act of Parliament; That length of time (were it much longer) would be no Plea for it: See Dr. *Barrow* in his Treatiſe of the *Pope's Supremacy*, *pag.* 154. He that has no right (ſays he) to the thing that he poſſeſſes, cannot plead any length of time to make his poſſeſſion lawful.

King *Henry* VIII. by Acts of Parliament, reſtored the Regal Eccleſiaſtical Sovereignty, after it had been uſurp'd upon by the Popes and their Prelates near 400 years, that is, from the time of *William* the Conquerour: For then began their Encroachment. And the Act of Parliament of 1 *E.* 6. *C.* 2. *Sect.* 3. calls it a power that had been Uſurp'd by the Biſhop of *Rome*, contrary to the Form and Order of the Common Law uſed in this Realm, in high derogation to the King's Royal Prerogative: from whence we may obſerve, That Uſurping upon the Common Law, and Uſurping upon the King's Prerogative, go together. The Biſhops Courts here in *England* took their Original from a Charter of *William* the Conquerour; ſo that this Juriſdiction was a great Limb lopp'd off from the Primitive Common Law of *England*: For before that Charter of King *William*, Eccleſiaſtical Cauſes were determin'd in the Hundred Court, and not by Witneſſes only, and not by the Canon Law, but by the Law of the Countrey. But this Charter was made by advice of the Arch-Biſhops, Biſhops, Abbots, Princes, and Temporal Lords. See *Fox* his Acts and Monuments, *Vol.* 1. *Lib.* 4. *pag.* 221. ſays Mr. *Prinn* in his firſt Tome of his Vindication of the Supream Eccleſiaſtical Juriſdiction of our *Engliſh* Kings. The Charter it ſelf, (ſays he) recites, that it was done *Communi Concilio*, for which he cites, *Seldeni ad Eadmerum*

merum Notæ, pag. 167, 168. So that ſtill the old Common Law of *England* hath been upon the loſing hand.

The *Civilians* hold, that *Poſſeſſor malæ fidei ullo tempore non præſcribit*; yet I heartily concur with that Reverend Chief Juſtice Sir *Edw. Coke*, (a moſt true and hearty lover of his Countrey, and an high honour to, and honourer of the Profeſſion of the Common Law,) in his 4 *Inſtit.* 246. at the end of that folio; in Reſpect, (ſays that Good and Great Man) that this Court of Equity hath had ſome continuance, and many Decrees made by it, it were worthy of the Wiſdom of a Parliament, for ſome Eſtabliſhment to be had therein, and to this intent have I chiefly uſed this freedom; for I never loved *Quieta movere*, but in order to a better Security. And for that end I chuſe to make this Humble Addreſs to the Houſe of Lords; It is the Houſe of Lords, who are the Supreme Court of Juſtice, that can ſet the true and legal Bounds and Limits to the Juriſdiction of Inferiour Courts, and can ſay to the biggeſt of them, Hitherto ſhalt thou come and no further, and here ſhall thy proud waves be ſtayed. And ſuch their Judicial Declarations are not to be controul'd by any, but the Legiſlative Power. Almighty God gave a ſtrict charge to his own choſen People of *Iſrael*, to obſerve thoſe Ordinances and Laws, which he gave them by *Moſes*, which were very particular, and wherein nothing was left to the Diſcretion of the Magiſtrate; nor had the Magiſtrate any Latitude, whereby he could depart from the plain and common ſence, and Judge *Secundum Æquum & Bonum* Arbitrarily. But they were commanded, *Deut.* 4. 2. *Yee ſhall put nothing to the word which I command you*, (ſays God by *Moſes*,) *neither ſhall ye take ought therefrom*; and the 12 *Deut.* the laſt verſe, in Caſes of Difficulty, that might ariſe upon the Conſtruction of thoſe Ordinances and Laws, a Proviſion is made by Almighty God, that in ſuch Caſes reſort ſhould be had to the Prieſt, and to the Judge who ſhould declare the Sentence of Judgment. This ſeems to refer to ſome ſpecial Revelation of the mind of God in ſuch difficult Caſes, which God made known to the Prieſt that ſtood before the Lord to miniſter, 17 *Deut.* 8, & 12 verſes; but here was nothing entruſted with the Prieſt or Judge, of relieving againſt the pretended rigour or extremity of the Law in any Caſe, and reſorting to another Court, without conſulting with Almighty God. And in Caſes of Difficulty of expounding of our Law, or ſupplying any defect; in the one Caſe we muſt have recourſe to the Supream Court, and in the other to the Legiſlative Power. The Judaical Law ſtoops ſo low, and is ſo preciſe and ſingular, as to tell them what might not be taken as a Pledge, what Number of Stripes might not be exceed-

Regula Juris.

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ed upon puniſhing an Offender. That Law, (as *Moſes* ſays of it) 30 *Deut. v.* 11. & 14. was not hid from them, but very evident, (as the Marginal Note ſays) ſo that none could pretend ignorance. It was near unto them, *Lex erat Domina & rectrix populi Iſraelis*, ſays *Melanchon* in his Chronicle. The Lord Chief Juſtice *Hale*, in his Preface to the Abridgment of *Rolls*, ſpeaking in Commendation of the Common Laws of *England*, ſays, Theſe are not the product of the Wiſdom of ſome one Man, but of the Wiſdom, Council, Experience, and Obſervation of many Ages, of Wiſe and Obſerving Men: They are the productions of much Wiſdom, Time and Experience. Again, ſays he, The Common Laws of *England* are more particular than any other Laws, and this prevents Arbitrarineſs in the Judge. General Laws leave a great Latitude to Partiality, Intereſt, and variety of Apprehenſions to miſapply them. And after all this Wiſdom, Certainty, Particularity, and mighty Caution to prevent Arbitrarineſs, ſhall they be all made Subject to the Sudden and Arbitrary Opinion of any one Man to Controul theſe Laws, under a pretence of Equity, againſt the Severity and Rigour, (as they term it) of theſe Laws? *Juſtitia eſt æqualitas, non quæ nobis videtur, ſed quam Lex ordinat*, ſays *Zenophon*, ſpeaking of a Deciſion of a Controverſie made by *Cyrus* amongſt the Youths, when *Cyrus* himſelf, being a Youth, was choſen a Judge amongſt them: But *Cyrus* not obſerving the Rule of Law, received Correction for it. *Quod docet* (ſays *Zenophon*) *leges ante-ferendas eſſe propriis opinionibus.*

9 E. 4. fol. 14. *There the Chancellor affirms, that he has an Abſolute Power.*

That the Common Law, and the Laws of the Land are *contra-diſtinct* from Equity Proceedings, and that the Proceedings in Equity are not comprehended under the general words of the Laws of the Land, or the Common Law, appears by many Authorities, and by the ſeveral Petitions of the Commons againſt the undue Proceedings of the *Chancery*: as 2 *H.* 4. *Numb.* 69. There the rightful Laws of the Land anciently uſed, are diſtinguiſh'd from the Proceedings by Writs or Letters under the Privy Seal in Chancery: ſo 4 *H.* 4. *Nu.* 78. 3 *H.* 5. *Nu.* 46.

It was ſaid with great Meekneſs, Moderation and Prudence, by that good natur'd Gentleman, and very learned Perſon, when in his height, (which he deſerv'd) the Lord Keeper *Bridgman*, in the Caſe of *Fry* and *Porter* in Chancery, being aſſiſted by the two Ch. Juſtices, and Ch. Baron, If I were (ſaid he) of another Opinion, yet I would be bound by the Opinion of my Lords the Judges: and doubtleſs he was in the Right, it being in a matter of Law, wherein not himſelf, but they

they were the ſworn and proper Judges. See the Modern Reports, Printed in 1682. *fol.* 313. 22 *Car.* 2. but a late Lord Chancellor followed not this Example. Now to ſatisfie the higheſt Judicature, (the Houſe of Lords,) that upon ſeveral Grounds, and for ſeveral Reaſons, a Prohibition by Law might be granted by the Court of King's-Bench; and to induce the Lords ſo to declare, (to whom that properly belongs,) which will be of great uſe for the future, after ſo long a diſuſing of it: I ſhall, with the favour of the Lords, cite theſe following Authorities; and when ſuch Prohibitions are granted, an Appeal, or Error, lies before the Lords upon it, ſo that the Lords do not part with any of their Juriſdiction by it. *Fitzh. Natura Brevium, fol.* 138. Letters *B. & C. Crok. Jac.* 335. *Heath verſus Ridley, Rolle's* 1 *Rep.* 252. If a Man ſue in any Court, a Plaint of Detinue, for any Charters that touch and concern Freehold, if it be not in the Court of Common Pleas, by Writ of the King, (where what concerns Freehold ought to be Sued,) the Party may Sue a Prohibition to forbid it. The words (*any Court*) muſt undoubtedly comprehend the Chancery Court of Equity. But yet more plainly in that point, ſee the form of that Prohibition, *viz. Cum placita de detentione Chartarum ſive Scriptorum Liberum Tenementum tangentium in aliquibus Curiis quæ Recordum non habent, ſecundum Legem & Conſuetudinem Regni noſtri ſine Brevi noſtro Placitari non debent, &c.* 4 *Inſtit.* of Sir *E. C. fol.* 71. It belongs properly to the Court of King's Bench, by granting Prohibitions to Courts Temporal, to keep them within their proper Juriſdiction. And in the 2 *Inſtit. fol.* 601, & 602, & 615. in anſwer to the 21th Article, the Temporal Courts muſt always have an Eye, that the Eccleſiaſtical Juriſdiction uſurp not upon the Temporal; and *fol.* 618. at the upper part of that folio, the Judges are bound by their Oaths to grant Prohibitions; and in the ſame 2 *Inſtit. fo.* 607. at the end of the Anſwer to the 10th Object. that Prohibitions are not of Favour but of Juſtice to be granted; this is affirmed by all the Judges.

Hooker in his *Eccleſiaſtical Polity, pag.* 26. ſtoutly affirms, That for the manifeſtation of the right of Governing, the aſſent of them that are to be governed ſeemeth neceſſary; and *pag.* 27. he further aſſerts, That all publick Regiment, of what kind ſoever, ſeemeth evidently to have ariſen from deliberate Advice, Conſultation and Compoſition between Men. If ſo, then it ought not to be aſſumed meerly by a Man's own Will and Pleaſure, or without any lawful ground, and againſt the known Rules of Law. Thus much for the Title and Right of Adminiſtring Juſtice: then as to the manner of the Exerciſe of it, when it is ſo aſſumed, it is moſt commonly ſuited to the

Uſurped Right and Title: And therefore Learned *Hooker*, proceeds further to ſpeak alſo to that point, *ibid.* To live, ſays he, by One Man's Will, is the Cauſe of All Men's Miſery. This, ſays he, conſtrain'd Men to come to Laws, that all Men might ſee their Duties before-hand, and know the penalties of Tranſgreſſing.

But if under the ſpecious pretence of the Laws being in ſome Caſes rigorous, and of relieving againſt that Rigour by the wide Rule of *Secundum æquum & Bonum*, it ſhall be in the breaſt of One Man of great Power, and in great favour, to diſpenſe with thoſe Laws, or to Judge according to his Diſcretion, by an Abſolute and Arbitrary, and *Dictatorian* Power: What becomes of my beſt * Birth-right, my Freehold and Inheritance, which I have in the known Laws of *England*? And what becomes of my property, which that known Law gave me? By which known Law I ſquared my Actions and Affairs, and thought my ſelf ſecure by it, and my Self, my Family and Poſterity well provided for. And after all, becauſe I could not divine, what might be the Diſcretion and Judgment of One great Perſon, and thereby have fenced againſt it, I muſt not only be defeated of my Right, diſappointed of a Proviſion for my Family, (for which I had long been labouring;) but beyond all expectation, after a tedious and chargeable waiting for the Event and Iſſue of a Chancery-Suit, I ſhall be doom'd to pay Two or Three hundred pounds by the Name of *Coſts*, becauſe I could not Prognoſticate, what would be the Opinion or Judgment of One ſingle Perſon upon my Caſe, who is not ſo tied to Rules as the Judges are. This wonderfully enriches the Men of the *Chancery*. *Leges humanæ* (ſays that good Chancellor *Forteſcue*, in his commendation of the Laws of *England*, *pag.* 11. on the *b.* ſide of the Page,) *non aliud ſunt quam Regulæ quibus perfectè juſtitia Edocetur*, as they are *Leges à ligando*, ſo they are *Regulæ à dirigendo & Regulando*. And *id. pag.* 25. *b.* & 31. *b.* (ſays the Chancellor ſtill,) *Non poteſt Rex Angliæ ad Libitum ſuum Leges mutare regni ſui.* This Excellent Chancellor *Forteſcue*, lived in the time of King *Hen.* VI. and was Ch. Juſtice of the King's-Bench, *Anno* 20 *H.* 6. (as appears by *Dugdale's Origines Juridiciales*, *pag.* 58, & 62.) yet has not a word to ſay in Commendation of this Equitable Juriſdiction, thô it then began to ſpring up, and he himſelf were Chancellor, (as he ſtiles himſelf,) but rather ſeems utterly to condemn it, by ſo highly commending the * Trials of matters of Fact by Twelve Men, and preferring it infinitely before that of the Ci-

* *See the Preface to* Cok. 5*th Rep. fol.* 4. *&* Hill. 8 *H.* 4. *fo.* 19. *by* Gaſcoign.

* 2 *Inſtit. fol.* 611. *See the Opinion of all the* 12 *Judges, in their Anſw. to the* 16*th Object. How much the Trial of a Fact by* 12 *Men Sworn*, vivâ voce, *is to be prefer'd before the Conſcience of One particular Man, guided by Paper-Proofs.*

vil Law, (which the Chancery follows) by the Teſtimony of Witneſſes only; and by as much extolling the certainty of our Common Law, adminiſtred by the Judges of it. Could he poſſibly have forgotten to mention that Juriſdiction, he himſelf being Chancellor, had he approv'd of it? It is excellent advice in the Preface to Sir *Edw. Coke's* 7 *Rep. fol.* 2. *b. Quoad fieri poſſit, quam plurima Legibus ipſis definiantur; quam pauciſſima verò Judicis Arbitrio relinquantur.*

Now let us take Notice of the ill Effects that have ariſen from the Exerciſe of this Equitable Juriſdiction, which in general words were taken notice of by a Bill, that lately paſſed One or both Houſes of Parliament; take theſe Inſtances.

Firſt, The Common Law of *England*, which is the * birthright of every *Engliſh* Man, and which is ſo agreeable to the Genius of this Nation, and a Law of their chuſing, is by this new Juriſdiction Subverted; and the Civil Law, which hath been ſo vigorouſly oppos'd by the Lords and Commons from the beginning, and in all Ages, is introduc'd; which brings our Rights and Eſtates to be determined, *ad aliud Examen*, to a Deciſion by Depoſitions of Witneſſes only, and in ſuch a manner examin'd, (as is obſerv'd by that incomparable Treatiſe of the Chancellor Sir *John Forteſcue*, *De Laudibus Legum Angliæ*) in a private Room, before an Officer call'd *An Examiner*, not before the Judge of the Court, and many times upon leading Interrogatories. Whereas, the Truth is beſt diſcovered, when Witneſſes are produced in the face of the Court, and Examined by the Judge of the Court, in the preſence of the Parties to the Suit, and their Council, and Witneſſes brought to confront one another. There is many times much in the Countenance and Carriage of a Witneſs, to help to the manifeſtation of the Truth or Falſhood of his Evidence, and by Queſtions ſuddenly asked him. *Tacitus* in his *Annals* in his Second Book, *Chap.* 8. tells us, that the ancient cuſtom of *Rome* was, That even the Veſtal Virgins, that in all other Caſes were recluſe and vailed, yet upon occaſion for their Teſtimony, they were examined as Witneſſes, in the common place of Pleadings and Judgment.

* *Hill.* 8. *H.* 4. *fol.* 19. *by* Gaſcoin, *that the Common Law is the Peoples Inheritance.*

Secondly, The Judgment and Determination of Cauſes in Chancery, depend upon the ſole Opinion and Conſcience of one ſingle Perſon, whoſe Power therein, (as ſome of our Books and Modern Authors preſume to affirm) is Abſolute and Arbitrary. Sir *John Davys* in his Preface to his Reports, *fol.* 11. *b.* ſays, The Chancellor hath *Poteſtatem abſolutam* in binding and looſing the Proceedings of the Law, and in deciding of Cauſes by the Rules of his own Conſcience; and that the King truſts him with his own Conſcience, *Tr.* 9. *E.* 4. *fol.* 14. *Paſc.* 22. *E.* 4. *Fitzh.*

Fitzh. Sub-Pæna, placit. 16. by *Huſſey*, The Chancellor's Judgment is not guided always by certain and known Rules, ſo that no foreſight can fence and provide againſt it. We are not fore-warn'd, and therefore cannot be fore-arm'd; and all this by a Juriſdiction, at the firſt aſſum'd, but not legally granted. The firſt Chancellor in this Exerciſe of this Power, not at all asking that material Queſtion, *Quis me conſtituit Judicem?* as our Bleſſed Saviour himſelf did in the like Caſe. And how expenſive and dilatory in Proceedings, we have been already told by the ſeveral Books and Authorities cited, and it ſhall be yet further obſerv'd.

We may read in the Lord *Coke*, in his *Magna Charta*, 29th *Chap.* in his Expoſition (*fol.* 51.) of the words (*per Legem Terræ*,) What miſchiefs and horrible vexations did ariſe, when this ancient and fundamental Law, this (*Lex Terræ*) was laid aſide, in divers Caſes by the Act of 11 *H.* 7. *Cap.* 3. and a Liberty given to proceed without any finding and preſentment, by the Verdict of Twelve Men, upon a bare information for the King; altho' the Juſtices of Aſſize, and Juſtices of the Peace, were entruſted in it, to proceed according to their Diſcretions, upon bare proof by Witneſſes, whereby the Judges and Juſtices, (who might beſt be truſted with ſuch a dangerous Power, if it might be allow'd to any) were not only Judges of the Law, as the Judges of the Common Law Courts at *Weſtminſter-Hall* are, but alſo in the place of a Jury, to judge and determine of Fact too, as the Equity ſide of the Chancery too often doth; and yet this Liberty was given by an Act of Parliament, (which cannot be ſaid of the Juriſdiction we are treating of,) yet the Nation could not bear it, but was reſtleſs till that intolerable Act of 11 *H.* 7. *Cap.* 3. was Repeal'd by the Act of 1 *H.* 8. *C.* 6. and the Tryals by Juries thereby reſtor'd again.

The Lord *Coke* in the ſame *Chap. fol.* 54. further declares, That if any Man, by colour of any Authority, where he hath not any in that particular Caſe, Arreſt or Impriſon any Man, or cauſe him to be Arreſted or Impriſoned, this is againſt this Act of *Magna Charta*: and it is moſt hateful, ſays he, when it is done by Countenance of Juſtice; and I take it to be worſe if done by a Countenance of Equity, and by colour of a new invented Writ, firſt devis'd By *John de Waltham.*

Mr. *Lambard* in his fore-cited *Archaion fol.* 84. ſpeaks thus, If the Chancery have no certain Rules and Limits of Equity, if it be not known before-hand, in what Caſes the Chancellor will relieve, and where not; then neither the Subject can be aſſur'd, how, or when he may poſſeſs his own in peace, nor the

Sir Hen. Sp. Gloſſ. 108.

the Practiſer in Law, be able to inform his Client, what may become of his Suit. *Miſera eſt Servitus, ubi jus eſt vagum, Cancellarius Angliæ,* (ſays Sir *Hen. Spel.*) *non aliter tenetur Decretis ſuæ Curiæ, vel ſui ipſius, quin, elucente novâ ratione, Recognoſcat, i. e.* he reviews, *quæ voluerit, mutet, & deleat, prout ſuæ videbitur Prudentiæ.* A certain late Author in his Preface to his Book entituled, *The happy future State of* England, Printed 1688. cites, *Leo Afer*, who tells us, That the Inhabitants of the Mountain *Magnan* on the Frontiers of *Fez*, have not any ſettled Judicature, nor certain Law; but for deciding of Controverſies, (when they happen) they ſtop ſome Travellers paſſing that way, to give Judgment in them, and they defray the charges of their ſtay: This is ſpeedy and cheap, but very uncertain in the Deciſion; they might as well determine by caſting Lots.

But we in *England* have contrary Laws, (as ſome do imagine;) ſo that we ſerve two Maſters, that are divided in their Commands, and command contrary things; and the one undoes what the other does. Theſe are like divers Weights and Meaſures, *which are an Abomination to the Lord, Prov.* 20. 10. In one Court they meaſure Men's Actions and Rights by one Rule, in another Court the ſame Actions again by contrary Rules, as if there were Two contrary firſt Principles and Deities in Nature, (as the *Marcionites* and *Manichees* held;) the one benign, kind, and indulgent; the other rigorous and deſtructive to Mankind.

The People of *England* have a Right to be Govern'd, and their Lives and Eſtates Subjected to no other Laws, but ſuch as are of their own chuſing, to which they conſent, according to that moſt excellent Preamble to the *Stat.* of the 25. *H.* 8. *Cap.* 21. The Laws of *England*, (as the Preamble tells us) have been taken by the People of *England* at their free Liberty, by their own Conſent, to be uſed among them, as the Cuſtoms and Ancient Laws Originally Eſtabliſhed, and not otherwiſe. Sir *Francis Bacon* in his *Reſuſcitatio, pag.* 65. in his Speech upon taking his place of Chancellor, tells us, that the Roman *Prætors*, (whoſe Office had the greateſt Affinity with the Juriſdiction claim'd in the Chancery,) uſed to ſet down at their Entrance, how they would uſe their Juriſdiction; and he acquaints us with the Excellent charge given him by King *James* I. at the delivery of the Seal to him, *viz.* To contain that Juriſdiction in its due limits, without ſwelling, or exceſs. The exceſs, or tumor, (ſays Sir *Fr.*) ariſes 1ſt from that Courts embracing Cauſes meerly determinable and fit for the Common Law: For the Chancery is ordain'd (ſays he) to ſupply the Law, not to ſubvert it; Tho' by his favour, the ſupplying of a Law is the pro-

per work of a Parliament. 2. The Tumor ariſes (ſays Sir *Fr.*) from neglect of the Aſſiſtance of the Judges in Caſes of Difficulty, eſpecially if they touch upon Law. The Power, ſays he (in his advancement of Learning,) of moderating Laws, little differs from the power of making them.

Pag. 445. *Aphor.* 37.

Vinius the Civilian ſets forth the true Office of the Roman *Prætor*, *pag.* 16. *Neque prætor aliud quam Magiſtratus ſuit Juridicundo, non Condendo. Cuſtos Juris, non Arbiter*; and again, *pag.* 12. *Neque ante Lex vi ſuâ conſtat, Civeſque ad Obſervationem vel pœnam obligat, quam populo innoteſcere potuerit, quod ſine promulgatione ſive publicatione aliquâ fieri non poteſt.* To every good Law of Man it is requiſite that it be manifeſt, (among other Properties,) ſays *Dr. and Student*, 4 *Chap. pag.* 7. *b.* Now, How is that Law manifeſt, that depends upon the ſudden Opinion and Judgment of One Perſon, who guides that Opinion and Judgment, not by any poſitive, certain, and particular Rule or Law clearly defin'd, but according to that large and indefinite Rule (*Secundum Æquum & Bonum*) which is directly contrary to the temper and mind of the Common Law of *England*, which delights in certainty? Sir *Fr. Bacon* in his *Advancement of Learning*, *pag.* 436. The firſt Dignity of Law (ſays he) is, That they be certain; Certainty is ſo Eſſential to a Law, as without it a Law cannot be juſt: and *pag.* 444. That is the beſt Law, which gives the leaſt Liberty to the Arbitrage of the Judge; and he is the beſt Judge that takes the leaſt Liberty: yet afterwards this Grave Chancellor is not ſteddy to himſelf, but is for allowing to *Prætorian* Courts of Equity, Power of ſupplying the defects of Law, which (as I ſaid before) does belong to the Parliament only; and herein he ſeems (under favour) not to be ſo conſiſtent with what he himſelf writes in his other Treatiſe.

It is very well obſerv'd by Dr. *Barrow* in his Treatiſe of the *Pope's Supremacy*, *pag.* 255. The means and methods by which Power and Juriſdiction from ſmall and modeſt Beginnings, arrive at laſt to a ſtrange Height and Exorbitancy. The *Patriarchate* Power (ſays he) of the Pope can no otherwiſe be claimed, but by his Invaſion and Aſſumption, *ibid.* 256. The Pope's univerſal Sovereignty and Juriſdiction hath no real Foundation, either in Scripture or elſewhere; and *pag.* 257. he ſhews by what means ſo groundleſs a Claim and Pretence, gained Belief and Submiſſion to it. Eminency of any kind, in Might, in Place, *&c.* does eaſily paſs into advantages of real Power and Command over thoſe that are inferiour, *&c.* Any ſmall Power is apt to grow (ſays he) and ſpread it ſelf into a Flame, *&c.* and *pag.* 261. All Power is attended by dependencies

cies of Perſons enjoying ſubordinate Advantages under it, which do grow proportionably by its encreaſe, enjoying Wealth, * exceſſive Fees, Credit, Support, Privileges and Immunities thereby: Let us look into the beginning of that late Juriſdiction of the Preſident and Council in the North. In the Annals of Queen *Eliz.* Printed 1630. *Lib.* 2. *pag.* 68. in the Reign of King *H.* 8. (ſays that nameleſs Author;) when the Rebellion in the North, about ſuppreſſing the Abbies, was pacified; whilſt the Duke of *Norfolk* ſtayed in thoſe parts, many Complaints were brought unto him of Wrongs done in the Rebellion: Some of them he compounded himſelf, and ſome of them he committed to Men of Wiſdom under his Seal, to be by them Compounded; which when the King underſtood, he ſent him a peculiar Seal to uſe in theſe Cauſes; and the ſame Seal he committed (after the Duke was called back) to *Tunſtall* Biſhop of *Dureſme*, and appointed to him Aſſiſtants, with Authority to hear and determine the complaints of the poor. He was then firſt of all named Preſident, and the Authority of his Succeſſors hath ever ſince encreaſed very much. This Preſidentſhip (ſays the Annals) which is now full of Honour, hath from a poor beginning grown up in a ſhort time to this Greatneſs: See Sir *E. C.* 4 *Inſtit.* 245. *Chap.* 49. upon the ſame Subject. *Ruſhworth* in the Second part of his *Hiſtorical Collections*, *pag.* 1336. mentions how that Mr. *Hide* (afterwards Lord Chancellor) then a Member of the Houſe of Commons in the Parliament, 1640. by Command from the Houſe of Commons, preſented to the Houſe of Lords a Complaint againſt this Court, of the Preſident of the North; and tells the Lords, that that Court by the Spirit and Ambition of the Miniſters truſted there, or by the natural Inclination of Courts to enlarge their own Power and Juriſdiction, had ſo prodigiouſly broken down the Banks of the firſt Channel in which it ran, as it had almoſt overwhelmed the Country, under the Sea of Arbitrary Power, and involved the People in a *Labyrinth* of Diſtemper, Oppreſſion and Poverty. Another Member of the Houſe of Commons complaining to the Lords of the *Star-Chamber*; firſt he ſets forth the Original of it by Act of Parliament, by the *Stat.* of *H.* 7. which he calls the Infancy of that Court: But he ſays further, that Court by Cardinal *Wolſey*, 8 *H.*8. was raiſed to Man's Eſtate; and from whence (ſays he) being now altogether unlimited, it is grown a Monſter, and will hourly produce worſe effects, unleſs it be reduced by that hand which laid the Foundation, which is by Parliament.

* *See in* Tacitus's *Annals*, *Lib.* 11. *cap.* 2. *What exceſſive Fees were taken by Advocates for Pleading Cauſes; whereas, by the Law* Cincia, *it was provided of old, that for Pleading of Cauſes, no Man ſhould take either Money or Gifts; at length their Fees were moderated by a Decree of the Prince and Senate.*

Let

Cowley *in his* Davideis, *pag.* 128.

Let Looſe but Power, and you ſhall quickly ſee,
How wild a thing unbounded Man will be.

It deſerves to be conſidered how it fares with the Profeſſion of the Common Law of late years, ſince the Chancery hath been ſo exalted. Readings at the Four Inns of Court twice every year, upon ſome publick uſeful Statutes which were very ancient, and of great eſteem and authority in our Courts of Juſtice, are now wholly diſcontinu'd. There being no conſideration had who have been Readers, in the call to the Degree of a Sergeant at the Law, nor in the choice of Judges, to the utter overthrow of that Exerciſe; the Lord Chancellor having a great ſtroak in recommending Perſons to that Degree and Employment; and this hath happen'd but of late, ſince the Court of Equity hath ſwell'd to that Height and Greatneſs. Nor have the Nobility and Gentry ſo much applied themſelves to the Study of the Common Law, nor the Students to the performance of Exerciſes, whereby they ſhould prepare themſelves for the practiſe of it, when they obſerve the Profit and Preferment to run in another Channel, and forſake the Old. Hence it comes to paſs, that an inferiour ſort of Men oftentimes procure themſelves to be admitted of the Inns of Court, and called to the Bar, and ſuddenly leap into mighty Practiſe and extraordinary Gain in the Court of Chancery, having taken no great pains in Study, but arriv'd only at ſome experience in the Courſe of that Court, which is ſoon attain'd to.

It may be worth the while to look into ſome of thoſe Caſes wherein theſe Courts of Equity do moſt frequently exerciſe their Juriſdiction, and then conſider whether there be any great neceſſity of *reſorting* to thoſe Courts for Relief in ſuch Caſes; or whether they might not be reliev'd more eaſily, with leſs expence, and more ſpeed, and as clearly by the help of the Courts of the Common Law, without going a tedious and chargeable Courſe at Common Law firſt, (as it ſometimes falls out,) which after all muſt ſerve for nothing, but be all ſet aſide, and a new, but more tedious and more chargeable and uncertain Courſe of Equity be undergone at laſt; which ſeems to Strangers, (not ſo much accuſtom'd to the like) to be very abſurd and impolitick, in the Conſtitution of our Laws and Courts. It is according to the Latine *Adage Penelopes telam texere & retexere.* Put the Caſe that a Man pays a Debt upon a ſingle Obligation, without taking an Acquittance, and afterwards he is Sued by the Obligee upon that Obligation, which is clearly againſt Conſcience, he cannot at Common Law plead payment

payment without producing an Acquittance, which he hath not to produce, and is therefore Remedileſs at the Common Law; for it is a Maxim, that every charge muſt be diſcharged, by that which is of as high a nature as that which charges. A Record muſt be diſcharged by a Record, and a ſpecialty by a ſpecialty, and not by a bare Averment of the Party that is charged with it: And the true reaſon upon which that Maxim is grounded is given by St. *Germin* in his Book Entituled, *A Dialogue between a Doctor of Divinity, and a Student of the Common Law*, written in the Reign of King *Henry* VIII. *pag.* 22. *b.* & 23. where he puts the ſame Caſe: That Maxim (ſays St. *Germin*) is grounded upon great reaſon, and to avoid a great inconvenience, that elſe might happen to come to many People; that is to ſay, That every Man by a bare Averment ſhall avoid a Bond, and this is the true reaſon of the Law; and tho (ſays St. *Germin*) it may follow thereupon, that in ſome peculiar Caſe a Man by occaſion of that general Maxim may be compelled to pay the Money again, yet the Law took heed to that which may often fall out, and do hurt among the People, rather than do hurt to particular Caſes. And the Law ſetteth a general Rule, which is good and neceſſary to all, and which every Man may well keep without it be thro' his own default. But after all, Tho' the Obligor in ſuch Caſe be Remedileſs at the Common Law, yet, ſays the Author (St. *Germin*,) *pag.* 23. he may be holpen in Equity by a *Sub-Pæna*. And ſo ſays Sir *Geo. Cary* in his Reports of Cauſes in Chancery, *pag.* 2. 1ſt Caſe, and there are Precedents of it in Chancery, ſays the Arch-Biſhop of *York*, who was Chancellor: And the like is ſaid by *Moreton*, Arch-Biſhop of *Canterbury*, then Chancellor, and afterwards Cardinal (another Clergy-man) *Paſc.* 7. *H.* 7. *fo.* 12. I ſuppoſe theſe Authors rather ſpeak the Uſage and Practiſe of the Chancery in ſuch Caſes, than what was their own Opinion and Judgment. For if this Relief in Chancery in ſuch Caſe may be allowed, what becomes of that great reaſon upon which that Maxim was grounded, (as the Author himſelf obſerved before?) and how is that great Inconvenience avoided by this Maxime, which the Author mentioned in the ſame breath? If the Chancery may receive the ſame Averment, and upon proof by Witneſſes, without trying the Fact by a Jury, that Court may relieve the Party. Does not the Inconvenience return again, and are not the People as much hurt by it? Or, is it a Miſchief and Inconvenience in the Common Law Courts, and none in a Court of Equity? It were better the Law were changed, and that

22 E. 4. *See that year Book*, fol. 6. *and that it ſhall be tried by Witneſſes; and the Judges are utterly againſt the* Sub-Pæna, *and the then Chancellor agreed to it.*

See Sir Edward Coke's 13 *Rep. fol.* 44. *in the upper part, concerning the infinite Exceptions to Witneſſes in the Civil Law Courts.*

ſuch Averment of the payment might be pleaded to the Action at the Common Law; where if Iſſue be joined upon it, it muſt not only be prov'd by Witneſſes, but found alſo by Twelve Men to be true, rather than the Chancery ſhall receive that Averment and allow it to be prov'd by Witneſſes only, and one ſingle Perſon to be Judge of the Fact, upon proof by Witneſſes, without referring it to the Judgment of Twelve Men; upon whoſe Verdict our Law, and the very Genius of the Nation from of old, lay ſo much ſtreſs, and are ſo fond of it. Yet let me obſerve further, That by the Chanceries doing this, there is another Great and Fundamental Maxim invaded; nay, ſeveral other Maxims; as that general Rule, That a Court of Equity cannot Relieve againſt a Maxim in Law; *Rolle's* 1 *Rep.* 219. And again, That a Court of Equity is not to determine of matter of Fact, if it be denied, but it ought to go to a Jury to Try it. And the Author of Doctor and Student himſelf appears to be of the ſame mind, not to allow of any *Sub-Pæna* in ſuch Caſe, *pag.* 155. in the middle of that page he holds, That where the Common Law in Caſes concerning Inheritances, putteth the Party from an Averment, for eſchewing of an Inconvenience that might follow thereupon, among the People, if the ſame Inconvenience ſhould follow in the Chancery, if the ſame matter ſhould be pleaded there; he ſays, no *Sub-Pæna* ſhould lie in ſuch Caſes; for as much and as great Vexations, Delays, Coſts and Expences might accrue to the Party, if he ſhould be put to anſwer ſuch Averments in the Chancery, as if he were put to anſwer them at the Common Law; and therefore, ſays that Author, it is, that no *Sub-Pæna* lyeth in ſuch Caſes, nor in any other like unto them.

In the Caſes of Conveyances made in Truſt, which is the great and buſie work of the Courts of Equity, to enforce the performance of thoſe Truſts, enough hath been already obſerv'd, how that the *Stat.* of 27 *H.* 8. makes Uſes and Truſts to be the ſame thing: and the drift of that Statute was to Transfer the Poſſeſſion to the Uſe, and thereby what before the making of that Statute was relieveable only in Equity, is by that Statute now relievable at the Common Law, and thereby the Common Law in Effect reſtor'd, which before was uſurp'd upon by that miſchievous Invention of Uſes. But how is the intent of that Law evaded, by making a groundleſs diſtinction between Uſes and Truſts, * to the mighty enriching of ſome Men? Mighty profit ariſes to that Court by Redemption of Mortgages, wherein Relief being given, long after the time limited by the Parties, great Inconveniencies happen to the Mortgagee, by expecting the event of a tedious Suit, and what his Eſtate or Intereſt will

* 44 E. 3. *fol.* 25. Bro. *Tit. Feofments to Uſes, plac.* 9. & *plac.* 20. *Feoffees to Uſes, are called Feoffees in Truſt.*

at

at laſt fall out to be, whether real, or only perſonal, or of what value, and how to diſpoſe of it in the mean time, as 'tis probable he would, if he knew it would be a real Eſtate, (as the Common Law does Judge it,) or whether only perſonal, and then to be left to an Executor, to perform his Will, or make a Proviſion for a younger Child, or how to diſpoſe of it in caſe it prove the one or the other; he is a long time held in Suſpence, till after ſome years the Court of Equity come to a Reſolution about it. Many good Propoſals have been made by a Bill lately depending in Parliament, and upon other occaſions, from others that have been well wiſhers to the Nation, that might have cured theſe Miſchiefs, but mightily oppos'd; For this is one of their *Diana's*, by which not only a Livelihood, but many a large Eſtate is gotten. The like miſchiefs do ariſe from long Leaſes, utterly againſt the Ancient Common Law of *England*; but being generally made in Truſt, and many times to attend upon the Inheritance, draws all the Trade into Courts of Equity; and they muſt be reſolv'd to have the ſame qualities with Eſtates of Inheritance, as to be limited by way of Remainder and the like; and thereby a Confuſion made of the diſtinct Species of Eſtates, whereby new and difficult Points and Caſes every day ariſe: but by theſe means, almoſt all the Eſtates in *England* will in length of time, by degrees, fall under the Deciſion of Courts of Equity. So alſo, by relieving againſt the Penalties and Forfeitures of Bonds and Securities for Money, which might and would eaſily be provided againſt, by the Agreement of the Parties in their firſt Sealing with one another; but is wholly neglected by reaſon of this common Relief given in Courts of Equity, in ſuch Caſes; tho to the great Vexation, and mighty Expence of the Parties at laſt, who repent of this Courſe, when it is too late.

But that which is of greater Importance than all that hath been hitherto obſerved, and is of a more Tranſcendent Nature in the Exerciſe of the Juriſdiction of Equity in the Chancery, is, that they relieve in Caſes after Judgment obtained at the Common Law, and render the Judgment of no Effect; ſo that all the time and charges ſpent in gaining that Judgment, are loſt.

They of the Chancery, ſuppoſing that the Statute of 4^to^ *Henry* IV. *Cap.* 23. doth not extend to the Court of Chancery, tho' it Ordain and Eſtabliſh in expreſs words, *viz.*

That after Judgment given in the Courts of the King, the Parties and their Heirs ſhall be thereof in Peace, untill the Judgment be undone by Attaint or Errour.

Which liberty being taken of a Juriſdiction in Equity, after Judgment at Law, tends (as the Preamble of that Statute does recite,) to the great impoveriſhing of the Parties aforeſaid, ſubverſion of the Common Law of the Land.

And the Preamble tells us what the miſchief was that occaſioned the making of that Statute, *viz.* That ſuch Judgments were again Examined, and the Parties made to come upon grievous Pain, (that is, by Proceſs of *Sub-Pæna,*) to anſwer thereof of new, ſometimes before the King himſelf, ſometimes before the King's Council, and ſometimes to the Parliament.

It does not indeed by plain and expreſs words mention the Chancery, which yet (as is held by the Chancery-men) is *Coram Rege* ;

But does the Statute reſtrain the King himſelf, and the Council, and the Supream Court, the Parliament, from the Liberty of examining into Equity after Judgment given? and can we Believe it might be indulged to any other Court whatſoever ? whether,to a Court then in being, (if the Chancery were ſo,) or to any other Court of Equity, that ſhould in after-times be Erected? Would not all the miſchief recited in the Preamble of that Statute, and intended to be remedied by it, return again upon us? Did the Makers of that Law mean to forbid it to theſe High Reſorts and Powers, the King, the Privy Council, and the Parliament, out of favour to the Chancery, or to any Court of Equity, that after the making of that Statute, ſhould aſſume to it ſelf a Juriſdiction in Equity ? that the Chancery, or ſuch other Court might Engroſs to it ſelf this mighty and exceeding buſie Employment, of Relieving in Equity after Judgment, and ſo over-top the Courts of the Common Law ? Will not the Common Law be ſtill Subverted thereby, which that Statute meant to redreſs ? And how will the Parties to ſuch Judgment be in Peace ? A Peace with a witneſs! to be involv'd again with a new tedious expenſive Chancery-Suit, ſo uncertain in the Event, and tied to no certain Rules.

When the Plaintiff at Law flatter'd himſelf, and was glad that he had arriv'd at his deſired Haven, *Poſt varios caſus, poſt tot diſcrimina.*-----

He is wonderfully deceived; he muſt ſet out to Sea again, to another long *Eaſt-India* Voyage.

But what Authorities, Law-Books, or Reſolutions of Judges, or Courts of Juſtice, have the Chancery had, for the expounding of the Statute of 4^to^ *Henry* IV. in this ſenſe ? which utterly makes that Statute of no Effect, beſides thoſe of itheir own Chancellors, and beſides the Privy-Seal of King *James* I. upon conſulting only with his own Council at Law; A very ſtrange way of Proceedng!

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The Great Seal and the Privy Seal are on their ſide, ('tis true) if theſe in ſuch Caſe muſt be ſubmitted to, what then becomes of the *Stat.* of 2 *E.* 3. *cap.* 8. whereby it is accorded and eſtabliſhed, That it ſhall not be commanded by the Great nor the little Seal, to diſturb or delay common Right: and tho ſuch Commandments do come, the Juſtices ſhall not therefore ceaſe to do right in any point; the *Stat.* of 14 *E.* 3. *c.* 14. is fully to the ſame effect.

The complaint againſt the late Court of *Star-chamber*, which yet was eſtabliſhed by Law, was, that by experience it was found to be an intolerable burthen to the Subject, and the means to introduce an Arbitrary Power: and therefore that Court was taken away by the Act of 16 *Car.* 1. *Cap.* 10.

I ſhall now on the other ſide endeavour to make it clear to the Honourable the Lords, that ſuch Proceedings of the Chancery, of Relieving after Judgment at Law, upon any pretence of Equity whatſoever, is not only againſt the expreſs words and meaning of that Act of 4 *H.* 4 but againſt the Ancient and Fundamental Common Law of *England*; and this I doubt not to make out by all ſorts of Authorities and Reſolutions, Ancient and Modern, and in the Reigns of ſeveral Kings and Queens of this Nation, and that not one authentick Legal Authority can be produced to the contrary.

I ſhall begin with the moſt ancient Authority, and that is in 6 *E.* 1. in the Caſe of the Earl of *Cornwall*, cited in Sir *Edw. Coke*'s 3 *Inſtit.* in the Chapter of *Præmunire*, *fol.* 123. Judgment was there given before the Juſtices of *Oier* and *Terminer*, againſt the Biſhop of *Exeter* and his Tenants: The Arch-Biſhop of *Canterbury* Excommunicated all Perſons that dealt in thoſe Proceedings againſt the Biſhop of *Exeter* and his Tenants, before thoſe Juſtices.

The Record ſays, That the Judgments given in the King's Court ought not to be Impeach'd in any other Court. This appears by that Record to be the Antient Law.

The *Stat.* of 4 *H.* 4. now treated of, is in effect a Declaration of the Common Law; for it recites in the Preamble (as was before obſerved,) that ſuch Proceeding was in Subverſion of the Common Law of the Land, which proves it to be done againſt the Common Law.

In the Caſe of *Cobb* and *Nore*, *Paſc.* 5. *E* 4. *Coram Rege*, cited by Sir *Edw. Coke*, in the ſame third *Inſtit. fol.* 123.

A Judgment was obtain'd by *Covin* and Practiſe, againſt all Equity and Conſcience in the King's-Bench: For the Plaintiff in the Judgment retained by Colluſion an Attorney for the Defendant, without the knowledge of the Defendant, then being beyond Sea; the Defendant's Attorney confeſſeth the Action,

whereupon Judgment was given: The Defendant ſought his Remedy by Parliament, and by Authority of Parliament Power was given to the Lord Chancellor, by advice of Two of the Judges, to hear, and order the Caſe according to Equity.

If the Chancellor had any ſuch Power before, what need was there of reſorting to the Parliament? *Non recurritur ad extra-ordinarium, niſi ceſſat ordinarium:* And why was it not referred to the Chancellor alone without Aſſociates, if it did of Right belong to him before? Such a Caſe in theſe days, would be held in *Chancery*, to be a moſt proper Caſe for the Relief of that Court.

And Note further, That one Perſon alone, thô a Lord Chancellor, was not to be entruſted with a Judicial Power, but others were joined with him.

In the 22 *E.4. fol.* 37. It is ſaid by *Huſſey, Ch. Juſtice*, If after Judgment the Chancellor grant an Injunction, and commit the Plaintiff at Law to the *Fleet*, the *King's-Bench* will by *Habeas Corpus* diſcharge him.

In the 21th year of K. *H.* VIII. Articles were Signed by Sir *Tho. Moor* (the Chancellor himſelf,) and by *Fitz-James* (Ch Juſtice,) and Juſtice *Fitzherbert*, againſt Cardinal *Wolſey*: One was for Examining matters in *Chancery*, after Judgment at the Common Law; in Sir *Edw. Cok.* 3. *Inſtit. fol.* 124. in Subverſion of the Laws; See the 2 *Inſtit. fol.* 626. at the end of that folio (before cited,) more of Cardinal *Wolſey*, and the Indictment againſt him.

In *Crompton's* Juriſdiction of Courts, *fol.* 67, & 69. and 57.* about the time of 13 *Eliz.* a Man was Condemn'd in Debt, in the *Common Pleas*; that is, had Judgment entred againſt him; and he Exhibited a Bill in *Whitehall*, and had an Injunction to ſtay Execution: and the Plaintiff that had the Judgment at Law, moved in the *Common Pleas* to have Execution, and it was granted, notwithſtanding the Injunction: afterwards the *Chancery* committed the Plaintiff at Law to the *Fleet*, for Suing out Execution; and the Lord *Dier*, (Chief Juſtice,) and the whole Court of *Common Pleas*, deliver'd him out of the *Fleet*, by *Hab. Corpus*.

* *Fol.* 41. & 67, & 57 *fully.*

In the Caſe of Sir *Moile Finch* and *Throgmorton*, *Mich.* 39. & 40. *Eliz. Throgmorton* Exhibited a Bill in *Chancery* againſt Sir *Moile Finch*, and ſhewed clear matter in Equity to be Relieved againſt a Forfeiture of a Leaſe, for years pretended by Sir *Moile*, for Breach of a Condition, where there was no default in the Plaintiff *Throgmorton.*

To which Bill the Defendant in *Chancery*, (Sir *Moile Finch*) Pleaded, That he had obtained Judgment in the *Exchequer*, in an Ejectment, in the Name of his Leſſee, againſt *Throgmorton*, (the

(the Plaintiff in *Chancery*,) and that Judgment had been affirm'd in Error, and demanded the Judgment of the *Chancery*; if after Judgment given at the Common Law, he ſhould be drawn to anſwer in Equity; *Egerton* would not allow the Plea, but over-ruled it.

(*Note*, He did not Plead the Statute of 4 *H.* 4. but grounded his Plea at the Common Law).

Queen *Elizabeth* referr'd the Conſideration of this Plea and Demurrer to all the Judges of *England*, (not to her own Council Learned in the Law;) for the Twelve Judges are the proper Judges of this Queſtion, tho it concern'd their own Juriſdiction.

After hearing Council, and the intent of the Lord Chancellor being ſaid to be, not to Impeach the Judgment, but to Relieve upon collateral Matter in Equity:

Upon great Deliberation, it was Reſolved by all the Judges of *England*, That the Plea of the Defendant in *Chancery* was good.

And that the Lord Chancellor ought not to Examine the matter in Equity, after the Judgment at the Common Law; For thô he would not Examine the Judgment, yet he would by Decree, take away the Effect of the Judgment.

And it is there ſaid, That the Precedents produced in the times of *H.*8. and *E.6.* were grounded upon the ſole Opinion of the Lord Chancellor, and paſſed *Sub Silentio.*

And that no Precedent nor Preſcription, could prevail againſt the Statutes of the Realm.

Thereupon, this being certified to the Queen, the Plea ſtood for a good Plea. *Note*, The Twelve Judges are the moſt proper Expounders of Statutes; ſee the 2 *Inſtit. fol.*611. in the anſwer to the 16th Objection, made by the Biſhops and Clergy; where all the Judges do affirm, That they never heard it excepted to, (before the time of King *James* I.) that any Statute ſhould be expounded by any other than by the Judges of the Law; and *fol.*618. in the anſwer of the Judges, to the laſt Objection of the Biſhops, it is truly ſaid by all the Judges of that time alſo; That if the Twelve Judges Err in Judgment, it cannot otherwiſe be reformed, (not by the Chancellor, nor by the Biſhops,) but Judicially by the Parliament, the Superiour Court, not by the Council Table neither.

They further reſolv'd, That the Interpretation of all Statutes that concern the Clergy, being parcel of the Laws of the Realm, do belong to the Judges of the Common Law; yet this was a Conteſt about Juriſdiction.

*P.*11. *Jac.* in the *King's-Bench*, *Crok. Jac fol.* 343. *Courtney verſus Glanvil*: The Plaintiff had a Decree againſt the Defendant *Glanvil*, after *Glanvil* had obtain'd a Judgment at the Common Law

Law by Confeſſion, and *Glanvil* was impriſon'd by the *Chancery* for not obeying the Decree. It is ſaid by *Cok. Ch. Juſt.* That the Decree and Impriſonment was Unlawful, being after Judgment; and that the *King's-Bench* upon an *Habeas Corpus*, ought to Relieve *Glanvil*. The ſame Caſe is reported by Sergeant *Rolles* in his 1ſt *Rep. Mich.* 12. *Jac. fol.* 111. and *Coke* ſaid, *While I have this Coif on my Head, I will not allow it.*

Hill. 11. *Crok. Jac. fol.* 335. in the *K. B. Heath* and *Ridley's* Caſe, It is ſaid by the Court, That by the Statutes of 27 *E.* 3. *cap.* 1. & 4 *H* 4. *cap.* 23. After Judgment given in *Curia Domini Regis*, be it in Plea Real, (not * Royal) or Perſonal, it ought not to be avoided but by Errour or Attaint.

* *Fitz. Abr. tit. Trial. plac.* 6. *By the word* (Royal) *is meant* (Real) *See that Caſe in the* Year-Book, *and Sir* Rob. Cott. *Abr.* 424. *Nu.* 110.

And in the ſame term, it was delivered for a general Maxim in Law, That if *any Court of Equity* doth intermeddle with any Matters, properly Triable at the Common Law, or which concern Freehold, they are to be *Prohibited.*

Mich. 12. *Jac.* in the *K. B. Roll.* 1 *Rep. fol.* 71. *Wright, verſus Fowler*, It was order'd by that Court, That Cauſe ſhould be ſhown why a Prohibition ſhould not be granted to the *Dutchy-Court*, for Proceeding upon a Bill in Equity after Judgment: thereupon the Plaintiff in Equity relinquiſh'd his Bill.

Mich. 13. *Jac. K. B. Rolles* 1 *Rep. fo.* 252. *Coats* and *Suckerman*, againſt Sir *Hen. Warner*; *George Crook* prayed a Prohibition to the Dutchy, for Examining a matter after Judgment in the *King's-Bench*, by *Coke*, *Crook*, *Doderidge*, and *Haughton*: It is ſaid, We are reſolved that *no Court of Equity* may meddle after Judgment, and a Prohibition was granted.

It is further ſaid, That a Prohibition may be granted by the *King's-Bench* to the *Common Pleas*, or *Exchequer*, and ſo of *all the Courts of* Weſtminſter-Hall; if they hold Plea againſt an Act of Parliament, or againſt the Common Law.

Mich. 16. *Car.* 1. in the *K. B. Crok. Car.* 1. *fol.* 595. *Calmadies* Caſe. A Prohibition was granted againſt the Court of *Requeſts* for proceeding in Equity, after a Judgment given in the *King's-Bench.*

And the Court Reſolv'd, That ſo they would always do, whenever any Exhibited Bills there, after Verdict and Judgment.

And the Caſe of *Auſtin verſus Brereton* is there cited, which was 40 *Eliz. Auſtin* obtained Judgment in the *King's-Bench*; the Defendant *Brereton* Sued in the Court of *Requeſts* to be Relieved, and the Plaintiff at Law was Committed by the Court of *Requeſts*, and was Bail'd by the *King's-Bench*; and Sir *Tho. Gawdy* (one of the Judges) was convened before the Queen for it, yet it was held good; and *Brereton* was enforced to ſatisfie the Judgment.

Mich. 7. *Car.* 2. 1655. in the *Exchequer*, Sir *Tho. Hardres Rep. fol.* 23 *Morel verſus Douglas*, The Bill in Equity was to be Relieved againſt

againſt a Judgment, by *Nihil dicit*, upon a Bond for the Money was paid. There was a Demurrer to the Bill, upon the *Stat.* of 4 *H.* 4. and the Court allowed the Demurrer.

There the Caſe of *Langham* and *Limbrey* is cited, where the ſame point was Ruled by the Houſe of Lords, by advice of all the Judges; the Judgment was for no leſs than 18000 *l.* in an Action of Covenant.

Trin. 1658. In the *Exchequer*, Sir *Tho. Hardres*'s *Rep. fol.* 121. *Harris verſus Colliton*; The Defendant had Judgment at Law againſt the Plaintiff in Equity, for Rent of an *Houſe*. The Plaintiff in Equity (*Harris*) Exhibited a Bill in Equity, to be Reliev'd againſt that Judgment; Suggeſting, that the Houſe was Demoliſh'd in the War, ſo that he could make no Profit. The Defendant in Equity (*Colliton*) ſets forth the *Stat.* of 4 *H.* 4. and Demur'd to the Bill.

See alſo the Book entituled, The Modern Reports, fol. 61. *in the caſe of* King *againſt* Standiſh.

Finch, (afterwards Lord Chancellor) argued for the Defendant *Colliton*, to maintain the Demurrer.

As to the Precedents he anſwers, That a 1000 of them will not change the Law, and many of them paſſed *Sub ſilentio*, or upon the ſole Opinion of the Chancellor, who is willing to enlarge his own Juriſdiction, (this was plainly and ſtoutly ſaid.)

He further held, That there were no regular Proceedings in Equity till of late times; for Parliaments ought to have been once or twice a year, to redreſs ſuch Grievances.

Stephens (who argued for the Plaintiff in Equity) held, That the Statute of 4 *H.* 4. did not extend to the *Chancery*, becauſe the Juriſdiction in Equity of the *Chancery* was* not in being, at the making of that Statute, and therefore it could not be reſtrained by it.

*Cok. 12 Rep. fol. 38. *at the lower end, Statutes that Prohibit Proceedings in Eccleſiaſtical Courts extend to Courts afterwards Erected.*

Bigland for the Defendant; That the Statute of 27 *E.* 3 *cap.* 1. of *Præmunire*, did not extend to a Suit in *Chancery*, becauſe the *Chancery* was not a Court of Equity, at the making of that *Stat.* and *Lambert* (who was a Maſter of the *Chancery* in his time) is cited to prove it.

And 'tis there ſaid, That the Chancellor TOOK NOT UPON HIM *ex Officio*, to determine matters in Equity till *Edw.* IVth's time.

Saunders (afterwards Chief Juſtice of the *King's-Bench*) of Council for the Plaintiff at Law, grants it to be true, that at the making of the Statute of 27 *E.* 3. there were no Proceedings in Equity in *Chancery*; but that the words (or in any other Court) will extend to any Courts that then were, or at any time ſhould be, where there might be the ſame miſchiefs, *viz.* by Impeaching Judgments given in the King's Courts, which are ſo often declared to be in Subverſion of the Law.

He affirms, That the Proceedings by Engliſh Bill in *Chancery*, are not *Coram Domino Rege in Cancellaria*, (as the Latine Proceed-

ings are,) but by a Bill or Petition directed to the Lord Chancellor, and not to the King. This Case was adjourn'd, and we heard of no further Proceeding. I was then of Council for the Plaintiff at Law to maintain the *Stat.* of 4 *H.* 4. and the Demurrer.

Crompton's Jurisdiction of Courts, in the chapter of the *Chancery*, *fol.* 67. he allows of the Statute of 4 *H.* 4. and agrees it extends to the *Chancery*, and mentions what is written by *Doctor and Student* upon that point.

So that here are all sorts of Resolutions in this very point, and from all sorts of Authorities in Law, and in several Reigns Ancient and Modern, by the whole Parliament, declared by several Statutes; by the House of Lords, by all the Twelve Judges, at several times; by all the Courts of Law in *Westminster-hall*, and in particular by the Court of *Exchequer*; most of whose business is to Relieve in Equity, grounded upon a Power and Jurisdicton, vested in them by Act of Parliament, if not by Prescription; (the two onely ways whereby a Jurisdiction in Equity can be given, as has been often resolved, and was before observed). And all these are Unanimous, not one Judge dissenting or doubting; not any one Resolution, Book, or Authority in the Law to the contrary: And yet, as I am informed, the Court of *Chancery* constantly, and without any *hesitancy* or scruple made of it, proceeds to Relieve in Equity after Judgment at Law.

The Plea and Argument for it on the *Chancery* side (which we may find in a late Author, the Title of whose Book is, *Reports of Cases in the Court of Chancery*, Printed 1693. to which is added Arguments to prove the Antiquity, Dignity, Power, and Jurisdiction of that Court: And much to that purpose is recited in Sir *Edw. Coke* 3 *Instit. fol.* 125. in the beginning of that folio.

It is a Privy Seal, 14 *Jac. Anno* 1616. whereby that King (assuming to himself a Power to Arbitrate between the Courts of the Common Law and the Chancery, in questions concerning their Jurisdiction, and more especially in the great Dispute between the Judges and the Chancellor; Whether the Chancery could Relieve in Equity after a Judgment obtained at Common Law; which Dispute did arise upon the construction of the *Stat.* of 4 *H.* 4. *cap.* 23. (whichdid by Law belong to the Judges to determine and resolve, as hath been proved: and they had determined it.)

King *James* taking it to belong to his Kingly Office, to Arbitrate in such Cases, Decides (as they would believe) the Controversie, by adjudging it with the Chancery, which he signifies under his Privy Seal; and thereby does Will and Command, the Chancellor shall from thence-forward proceed to give such

Relief

Relief in Equity: And this was done againſt the Unanimous Reſolution of all the Judges of *England*, and without calling the Judges to Debate it, and without any Hearing of them; looking upon them as Parties concerned and practical, (which is a Scurvey Reflection, and Scandal upon the Juſtice of the Nation; See the 2d *Inſtit.* of Sir *Edw. Cok. fol.* 617. The Anſwer of the Twelve Judges to the Twenty fourth Objection, to this purpoſe;) ſo that the King upon hearing his own Council, Learned in the Law, only took upon him to Over-rule all the Twelve Judges in a point of Law, and to Interpret and Expound an Act of Parliament, which properly belongs to the Judges, next under the Supream Court.

And no wonder is it, if King *James* I. took this Arbitrage upon him, as belonging to his Kingly Office, and reſolved it under his Privy Seal; when his conſtant Opinion was, that he was above the Law; and that it was Treaſon to affirm the contrary; which yet all the Twelve Judges ſtoutly did; and cited *Bracton* for it; *Rex ſub Deo & Lege*. See a Collection of King *James*'s Works, in a large Folio, Printed 1616. *pag.* 203. where he affirms, that the King is above the Law, and that he may Interpret it: And *pag.* 534. That it is his Office to make every Court to contain it ſelf within his own Limits; See the Act for regulating of the Privy Council, *&c.* 16 *Car.* 1. *cap.* 10. before-mentioned in the 5th Paragraph, it is Declared and Enacted, That neither his Majeſty, nor his Council, have, or ought to have any Juriſdiction, Power, Authority, by Petition, Articles, or any other way, to draw into queſtion, determine, or diſpoſe of the Lands or Goods of any of the Subjects of this Kingdom; but the ſame ought to be Tried and Determined in the ordinary Courts of Juſtice, and by the ordinary Courſe of Law. See the ſeveral ancient Statutes that require and command the Judges to proceed to adminiſter Juſtice, without Regard had to the Great, or Privy Seal, that command the contrary, *Magna Charta cap.* 29. 2 *E.* 3. *c.* 8. 14 *E.* 3. *c.* 14. 20 *E.* 3. *c.* 11.

See Sir E. C. 12 *Rep. before cited*, fo. 65. *at the upper end the Opinion of K.* James I.

See 2 Inſt. fo. 601. *the* 1*ſt Objection.*

Some will argue for the Juriſdiction of the Chancery in Equity, from the Statute of *Weſtminſter* the 2d, 13 *E.* 1. *cap.* 24. which directs, That *Nemo recedat à Curia Regis ſine Remedio*; from hence they Collect, that where there is matter of Equity, wherein the Common Law cannot Relieve, there the Chancery by this Statute is enabled to provide Remedy.

Whereas the Deſign and Scope of that Statute extends no further than to the framing of Writs, in order to Relief by Actions at the Common Law, where the Regiſter of Writs (that ancient Book of Law) had for ſome new and ſpecial Caſes provided no Writ; which is the firſt ſtep in every Action, and is proper work for the Chancery, which is therefore ſtyled, *Officina Brevium*.

It is very far from giving that Court any Juriſdiction in Equity; but it ſhews what Remedy is to be given towards a Proceeding at the Common Law, and not to Relieve againſt it.

But it may be noted from this ancient Statute, that neither the Chancellor nor the Chancery could alter an Original, or ſo much as frame a new Writ, were there never ſo great Neceſſity for it, till enabled by this Statute. It could be done only by the Parliament; and in ſuch Caſes the Parties were forced to wait till the meeting of a Parliament, tho they had manifeſt Right, and clear Equity on their ſide, but no Remedy at Law. If it were then a Court of Equity, why did not the Chancery Relieve in Equity, becauſe the Party was without Remedy at Law?

Note in the next place, That the Parliament by that Statute doth not entruſt the Chancellor alone, nor any one Perſon, with the framing of new Writs, fitted to ſuch new Caſes; tho they were Caſes that had a manifeſt Right, but not a Legal Remedy; and yet, Writs ſerve but as a mean to bring

bring the Caſe to a Judgment; but it refers the matter alſo to the Clerks (now called the Maſters of the Chancery) to frame Writs for ſuch new Caſes. And thoſe Clerks (now Maſters) were, as *Fleta* deſcribes them, Men of profound Science, (What! in the Civil Law? no, but) in the Laws and Cuſtoms of *England*; *Qui in Legibus & Conſuetudinibus Anglicanis notitiam habeant pleniorem.*

2 *Inſtit. fol.* 408. And theſe Maſters have Caution given them by that Statute, that if any Doubt or Difficulty did ariſe about framing thoſe Writs, *Atterminent querentes ad proximum Parliamentum, & Scribantur Caſus in quibus concordare non poſſunt. Et de conſenſu Juris peritorum fiat breve.*

Why was it not referred in ſuch Caſe to the Lord Chancellor, at leaſt where the Maſters could not ſettle and agree the Form, it being a Form? No, not to any one Man, and it was a Work proper for a Parliament; and in thoſe days, Parliaments met often for theſe very purpoſes; and it was ſettled by an Act of Parliament in King *Alfred*'s time, (and it is a Law ſtill in force,) That for ever, twice a year, or oftner, if need were, in time of Peace, a Parliament ſhould be holden at *London*; and as *Bracton* (a Judge) tells us, this was ſo ordain'd to determine of Caſes that were new, and had no Remedy at Law, or a doubtful Remedy, but good Equity; (where was the Chancery-Equity then?) *Si aliqua Nova & inconſueta Emerſerent, quæ nunquàm prius evenerunt: Ponantur in reſpectu uſque ad Magnam Curiam, ut ibi per Concilium Curiæ terminentur.*

Ryley, ibidem, fol. 411, 386, 374, 373, 371, 361, 362. And there are infinite Precedents, (ſays the Learned *Coke*) in the Rolls of Parliament, of ſuch references to the Parliament; and to that end were Parliaments ſo often to be held; and it took up moſt of their time. See *Ryley*'s *Placita Parliamentaria*, in the Appendix, *fol.* 525.

And the infrequency of Parliaments hath given occaſion to other Courts to Tranſact in thoſe matters, that are indeed proper for the Parliament. The Exorbitances of great and high Officers have been many times a means to hinder and prevent the frequent Meetings of Parliament, as in the Caſe before mentioned of Cardinal *Wolſey*; leaſt their Exorbitancies ſhould be queſtioned.

All theſe Miſchiefs might be Remedied, either by ſome good Act of Parliament to be Paſs'd, as has been often endeavour'd; or by Referring the Determination and Judging of Bills of Review of their Decrees into good and indifferent hands; or by the Supreme Court's declaring, that the Courts of the Common Law in *Weſtminſter-hall*, ought, *ex Debito Juſtitiæ* to grant Prohibitions to any Court whatſoever, that either Uſurp a Juriſdiction where they have none of Right, or exceed their Juriſdiction where they have one. This Legal Remedy having been long diſuſed and laid aſleep wants a Revival. In order to obtain theſe peaceable and moſt neceſſary Helps, this ſmall Treatiſe is Humbly recommended to the grave Conſideration of the HOUSE OF PEERS.

FINIS.

ERRATA.

Page 21. line 31. *politically* r. *politiquely.* P. 32. l. 6. r. *his Exerciſe.* P. 40. l. 43. *it heir* r. *their.*